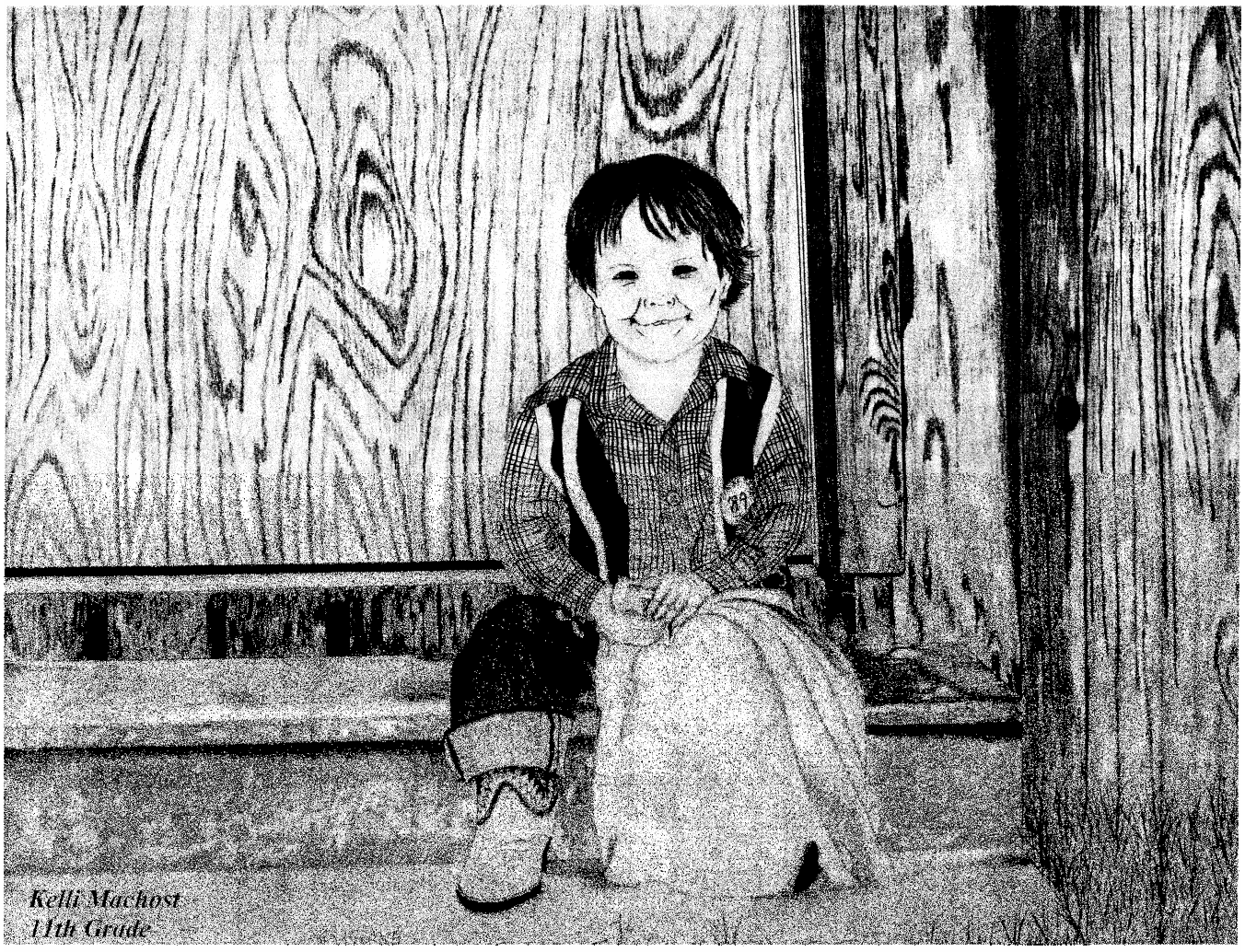
TEXAS REGISTER

Volume 31 Number 28 *July 14, 2006* *Pages 5505-5714*



Kelli Machost
11th Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

Texas Register, **(ISSN 0362-4781, USPS 120-090),** is published weekly (52 times per year) for $211.00 ($311.00 for first class mail delivery) by LexisNexis Matthew Bender & Co., Inc., 1275 Broadway, Albany, N.Y. 12204-2694.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Albany, N.Y. and at additional mailing offices.

POSTMASTER: Send address changes to the ***Texas Register,*** 136 Carlin Rd., Conklin, N.Y. 13748-1531.

a section of the
Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(800) 226-7199
(512) 463-5561
FAX (512) 463-5569
http://www.sos.state.tx.us
register@sos.state.tx.us

Secretary of State –
Roger Williams

Director - Dan Procter

Staff
Ada Aulet
Leti Benavides
Dana Blanton
Belinda Bostick
Kris Hogan
Roberta Knight
Jill S. Ledbetter
Juanita Ledesma

IN THIS ISSUE

PROPOSED RULES

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 7. BANKING AND SECURITIES

PART 8. JOINT FINANCIAL REGULATORY AGENCIES

CHAPTER 153. HOME EQUITY LENDING

7 TAC §153.22

The Finance Commission of Texas and the Texas Credit Union Commission ("commissions") jointly re-propose §153.22, relating to home equity lending under Texas Constitution, Article XVI, Section 50(a)(6). A prior proposed §153.22, published in the March 3, 2006, issue of the *Texas Register* (31 TexReg 1393), is withdrawn in this issue of the *Texas Register*. Existing §153.22 is re-proposed for repeal.

Texas Constitution, Article XVI, Section 50 ("Section 50"), sets out the only permissible encumbrances on a homestead. Pursuant to Section 50(u), as implemented by Texas Finance Code, §11.308 and §15.413, the power to interpret Sections 50(a)(5) - (7), (e) - (p), and (t) of the Constitution has been separately and independently delegated to the commissions, subject to the statutory admonition that the commissions strive for consistency in the exercise of this independent authority. To promote the goal of consistency and better support the confidence of homeowners and lenders seeking to comply with Section 50, the commissions have chosen to jointly exercise their interpretive authority. The commissions have jointly adopted procedures for requesting interpretations, codified in 7 TAC Chapter 151, and jointly adopted interpretations are codified in 7 TAC Chapter 153. Texas Government Code, Chapter 2001, governs the process by which interpretations are adopted.

Because of the significantly adverse consequences that can befall a lender who violates a provision of Section 50, clear and unambiguous guidance regarding the meaning of such provisions supports the stability of the credit markets. This stability benefits consumers by ensuring that home equity loans are as widely available to Texas homeowners as possible. Availability, certainty, and competition result in reducing the overall transaction cost to consumers for equity loans. The commissions therefore accept that their interpretive power must extend beyond mere definition of words and terms in Section 50 to encompass "filling in the gaps" with respect to material matters that are inadequately addressed in Section 50, including the possible addition of further details to the extent the commissions believe necessary to fully implement the intent and purposes of Section 50. In addition, because lenders and borrowers engaged in credit transactions involving the homestead must consult and comply with other state and federal law that governs mortgage lending, the commissions strive to interpret the Constitution in a manner that harmonizes with such other law.

Concerns have been raised that existing §153.22 may be a restricted reading of the constitutional language. The commissions proposed a new interpretation to seek comment on replacing existing §153.22, which was published in the March 3, 2006, issue of the *Texas Register* (31 TexReg 1393). The commissions received comments on the new proposal which prompted staff to recommend certain changes in the language of the proposed new §153.22. The commissions believe that further public input would be beneficial and have decided to republish the interpretation for further comment.

To facilitate consideration of the public's views, the commissions seek public comment in the form of answers to questions on two discrete issues: (A) Whether the notice requirement of Section 50(g)(Q)(5) is sufficiently in harmony with the substantive law of Section 50(a)(6)(Q)(v); and (B) Does the notice provision conflict with Section 50(a)(6)(Q)(v) such that Section 50(a)(6)(Q)(v) must prevail. See *Stringer v. Cendant Mortg. Corp*., 23 S.W.3d 353, 356-57 (Tex. 2000).

A reading of Section 50(a)(6)(Q)(v), standing alone, could require a lender to provide an owner with copies of each and every document containing an owner's signature that is in any way related to the equity loan, without regard to how the document relates to the equity loan, whether the document is signed by the owner in relation to the equity loan, when the document is signed, or whether the lender even possesses the document. The provision could even require a lender to give the owner copies of such owner-signed, non-closing documents as driver licenses, IRS forms, financial statements, signed verifications of employment, signed verifications of accounts, checks signed by the owner, letters and emails sent by the owner, owner-signed property records from previous real estate transactions, and documents a lender opts to have the owner sign simply to verify the document's receipt. The commissions previously concluded that the framers did not intend such a result. No person submitting comments or testimony to the commissions has suggested that such a reading is appropriate.

The commissions are also aware of views that suggest an interpretation should only require the lender to provide the owner with documents signed at closing. There are concerns that the phrase "related to the extension of credit," if construed broadly, might include documents that have previously been provided to the owner, which would add a significant and burdensome process to home equity lending without adding significant benefit to the owner. The commissions, therefore, seek comment with specificity regarding a broader interpretation of the noted phrase.

As currently proposed, §153.22(1) interprets Section 50(a)(6)(Q)(v) by defining the phrase "documents signed by the owner related to the extension of credit." As so defined, the lender is required to furnish a copy of a document to the owner

at closing if the document is within the lender's possession or control, has been signed by the owner as a condition to obtaining the equity loan, and was intended either for use in the process of evaluating or underwriting the equity loan, or alters or creates a legal obligation of a party to the equity loan.

Harold Feeney, Credit Union Commissioner, on behalf of the Texas Credit Union Commission and Leslie L. Pettijohn, Consumer Credit Commissioner, on behalf of the Finance Commission of Texas, have determined that for the first five-year period the interpretation is in effect there will be no fiscal implications for state or local government as a result of administering the interpretation.

Commissioner Feeney and Commissioner Pettijohn also have determined that for each year of the first five years the interpretation as proposed is in effect, the public benefit anticipated as a result of the proposed interpretation will be to support the stability of the credit markets and ensure that equity loans are widely available to Texas homeowners, through the creation of reliable standards and guidelines.

There is no anticipated cost to persons who are required to comply with the interpretation as proposed. There will be no adverse economic effect on small or micro businesses.

Written comments on the proposed interpretation may be submitted to Harold Feeney, Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699, or to Sealy Hutchings, General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to commissioner@tcud.state.tx.us or sealy.hutchings@occc.state.tx.us. To be considered, a written comment must be received on or before the 30th day after the date the proposed section (interpretation) is published in the *Texas Register*. At the conclusion of the 30th day after the proposed interpretation is published in the *Texas Register*, no further comments will be considered or accepted by the commissions.

The Credit Union Commissioner and the Consumer Credit Commissioner have been delegated the authority to conduct a public meeting on behalf of the commissions for the purpose of receiving oral comments, views, and/or testimony concerning the proposed interpretation. A public meeting will be held in Austin on July 27, 2006, at 2:00 p.m. in the State Finance Commission Building, William F. Aldridge Hearing Room, located at 2601 North Lamar Boulevard. To be considered, an oral comment must be received at this public meeting; at the conclusion of the meeting, no further oral comments will be considered or accepted by the commissions.

Persons with disabilities who are planning to attend the meeting and have special communication or other accommodation needs should contact Joann McAnally at the Office of Consumer Credit Commissioner at (512) 936-7640. Requests should be made as far in advance of the meeting as possible.

The interpretation is proposed pursuant to Texas Finance Code, §11.308 and §15.413, which separately and independently authorize each commission to issue interpretations of the Texas Constitution, Article XVI, Section 50(a)(5) - (7), (e) - (p), (t), and (u), subject to Texas Government Code, Chapter 2001.

The Texas Constitution, Article XVI, Section 50(a)(6), is affected by the proposed interpretation.

§153.22. Copies of Documents: Section 50(a)(6)(Q)(v).

The lender, at the time the extension of credit is made, must provide the owner of the homestead a copy of all documents signed by the owner related to the extension of credit.

(1) The phrase "documents signed by the owner related to the extension of credit," as used in Section 50(a)(6)(Q)(v), means documents that are:

(A) in the lender's actual or constructive possession, custody, or control;

(B) signed by the owner as a condition to obtaining the equity loan; and

(C) intended either:

(i) as information for use in the process of evaluating or underwriting the equity loan; or

(ii) to alter or create a legal obligation of a party to the equity loan.

(2) The phrase "possession, custody, or control," as used in this section, means that the lender either has physical possession of the document or has a right to possession of the original document that is equal or superior to the person who has physical possession of the document.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603559
Leslie L. Pettijohn
Commissioner
Joint Financial Regulatory Agencies
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 936-7622

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER F. REGULATION OF TELECOMMUNICATIONS SERVICE

16 TAC §26.127

The Public Utility Commission of Texas (commission) proposes an amendment to §26.127, relating to Abbreviated Dialing Codes. The proposed amendment will designate the use of the abbreviated dialing code "811" for "One Call" advanced notification and inquiry related to excavation activities and underground facilities. This proposed amendment implements *Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Sixth Report and Order, CC Docket No. 92-105, FCC 05-59 (Mar. 14, 2005) (Order), in which the Federal Communications Commission (FCC) designated 811 for One Call purposes. The use of 811 is intended to replace a myriad of telephone

numbers with a nationally uniform number to allow contractors and property owners to give advance notice of excavation plans and allow facility operators to mark underground facilities prior to excavation to prevent facilities damage and service outages. Project Number 32000 is assigned to this proceeding.

Janis Ervin, Senior Policy Specialist, Infrastructure Reliability Division, and Mark Hallmark, Attorney, Legal Division, have determined that for each year of the first five-year period the proposed amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Ms. Ervin and Mr. Hallmark have determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amended section will be the use of a uniform abbreviated dialing code that facilitates notice of excavation to facility operators and allows facility operators to protect underground facilities, thereby reducing the possibility of facilities damage and service disruptions. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this amended section. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed. The Texas Underground Facility Notification Corporation (doing business as One Call Board of Texas) currently operates a toll free-number (1-800-545-6005) for "One Call" purposes. It is anticipated that calls to the current toll-free number will be gradually migrated to the abbreviated dialing code within the two-year timeframe envisioned by the FCC's Order.

Ms. Ervin and Mr. Hallmark have also determined that for each year of the first five years the proposed amendment is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, only if requested pursuant to the Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Tuesday, August 29, 2006 at 10:00 a.m. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed amendment (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Parties are also requested to e-mail an electronic copy of comments to janis.ervin@puc.state.tx.us, if possible. Comments should be organized in a manner consistent with the organization of the proposed amendment. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposal. The commission will consider the costs and benefits in deciding whether to adopt the amended section. All comments should refer to Project Number 32000.

This amendment is proposed under *Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Sixth Report and Order, CC Docket No. 92-105, FCC 05-59 (Mar. 14, 2005) and Texas Utilities Code §14.002, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Reference to Statutes: Texas Utilities Code §14.002, §251.001 et seq.

§26.127. Abbreviated Dialing Codes.

(a) Code assignments. The following abbreviated dialing codes may be used in Texas:

(1) - (6) (No change.)

(7) 811--One Call Excavation Notification [~~Business Office~~]; and

(8) (No change.)

(b) - (e) (No change.)

(f) 811 service.

(1) Scope and purpose. This subsection applies to the assignment, provision, and termination of 811 service. Through this subsection, the commission implements the Federal Communications Commission's requirements in *Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Sixth Report and Order, CC Docket No. 92-105, FCC 05-59 (Mar. 14, 2005), that designated 811 as the national abbreviated dialing code to be used by state One Call notification systems for providing advanced notice of excavation activities to underground facility operators in compliance with the Pipeline Safety Improvement Act of 2002. The commission intends to reduce the possibility of disruptions to underground facilities by implementing 811 service. Implementation of 811 service will facilitate advance notice by excavators of planned excavations to facility operators, allowing facility operators to mark and prepare their facilities before excavation.

(2) Authority. Authority for One Call Excavation Notification resides with the Texas Underground Facility Notification Corporation (doing business as One Call Board of Texas) pursuant to Section 251 of the Texas Utilities Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603526
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 936-7208

♦ ♦ ♦

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 78. TALENT AGENCIES

The Texas Department of Licensing and Regulation ("Department") proposes amendments to existing rules at 16 Texas Administrative Code ("TAC"), §§78.1, 78.10, 78.20, 78.21, 78.30, 78.40, 78.70, 78.72, 78.75, 78.80, and 78.90 and proposes the repeal of existing rules at 16 Texas Administrative Code §§78.22, 78.71, 78.74, 78.82, and 78.100 regarding the talent agency program.

The proposed amendments and repeals arise as a result of the department's rule review process. On May 20, 2005, the department published a Notice of Intent to Review the talent agency rules in the *Texas Register* (30 TexReg 3040). The public comment period closed on June 20, 2005. The department received

two written comments from individuals and/or organizations with suggested rule changes. The department determined that the reasons for initially adopting talent agency rules continued to exist and that the rules were essential to implementing Texas Occupations Code, Chapter 2105. The rule review was adopted on August 3, 2005 by the Commission of Licensing and Regulation. On August 30, 2005, the department hosted an external focus group to discuss the talent agency rules. Talent agencies, trade associations, and other interested parties attended the focus group meeting. Based on the two written comments received during the rule review process and the numerous oral comments received during the external focus group meeting, the department proposes amendments and repeals to the talent agency rules to clarify the statutory and rule requirements.

The proposed amendments and repeal are necessary to clarify registration requirements, such as out-of-state talent agency websites and advertisements in Texas and out-of-state talent agencies operating temporarily in Texas; to delete references within the chapter to "open model calls" and "personal agents" to emphasize that a talent agency is a person or entity under any name or title who is in the business of performing services described under the Act; to add registration requirements relating to a talent agency's change of ownership and change of location and to state initial and renewal application requirements; to remove certain exemptions from the chapter that are not statutorily based; to clarify surety bond requirements and add submission of proof of a surety bond in good standing for talent agency renewal registrations to improve compliance with the Act and to protect consumers; to remove an existing provision that allows out-of-state agencies to operate in Texas if hosted by a Texas-registered talent agency; to remove a requirement for talent agencies to file a schedule of commissions and fees with the department; to clarify the statutory prohibition against registration or advance fees in light of industry concerns for talent agencies' ability to charge artists fees for internet websites, photographs, and training sessions; to clarify the number of days in which a talent agency must deposit monies received from a client and the number of days in which to disburse those monies to the artist; to clarify the existing annual fee, without substantive change, and to reduce the fee for a talent agency to obtain a revised/duplicate certificate of registration; and to clarify sanctions against a talent agency when the talent agency holds a registration at more than one Texas location.

An amendment to §78.1, "Authority," deletes the reference to Chapter 53 of the Texas Occupations Code because Chapter 53 is not an authority under which the rules are promulgated. Occupations Code, Chapter 53 remains applicable by its terms and the department's rules under 16 TAC Chapter 60, to require the department to review criminal conviction backgrounds for license applicants.

Proposed new §78.10(1) adds a definition for "Act," for easier reference to Texas Occupations Code, Chapter 2105, the statute regulating talent agencies.

Proposed §78.10(2) updates the existing statutory citation to refer to the "Act" within the definition of "artist." There is no substantive change to this paragraph.

An amendment to existing §78.10(2) deletes the definition of "mother agency" in its entirety. A definition for this term is unnecessary because concurrently proposed rules delete the reference to this term within the chapter.

Proposed §78.10(3) adds a definition for "financial interest" because a concurrently proposed rule under §78.70(b) utilizes this phrase.

An amendment to existing §78.10(3) deletes the definition of "open model call" in its entirety. A definition for this term is unnecessary because concurrently proposed rules delete the reference to this term within the chapter.

Proposed §78.10(4) adds a definition for a talent agency owner because the term is used throughout the chapter. The proposed rule is based on §2105.052 of the Act.

Proposed §78.10(5) amends the definition of "talent agency location" for consistency with concurrently proposed rules under §78.20. Texas and out-of-state talent agencies must have a registration in accordance with §78.20.

An amendment to §78.20(a) deletes portions of existing subsection (a) in order to relocate and clarify those portions to concurrently proposed §78.20(b) and (c) for better understandability. An amendment to this subsection adds a phrase to emphasize that registration is required "for each talent agency location," as required under the Act. The proposed rule adds clarification that a Texas-registered talent agency may operate from a temporary location in Texas.

An amendment to existing §78.20(b) deletes this provision in its entirety in order to address a person's registration requirement based on concurrently proposed §78.20(b).

Proposed §78.20(b) and (c) seek to clarify language relocated from existing subsection (a) relating to the registration requirements under that section requiring a registration for talent agencies that have "a place of business in Texas," that "recruit artists from a temporary location in Texas," or that "advertise in Texas." Proposed §78.20(b) restates, without substantive change, existing language from subsection (a) requiring talent agencies that have a place of business or a temporary location in Texas to obtain a certificate of registration to operate the talent agency. Also, proposed §78.20(b) emphasizes that a talent agency is a person by any name or title who is in the business of performing the services described under the Act. This language is consistent with the Act and clarifies the references in existing §78.20(a) and (b) relating to "personal agents or any persons under any name or title" and "model call or casting call" whose actions fall within the scope of the Act.

Proposed §78.20(c) modifies the existing language relocated from existing §78.20(a) that requires persons who "advertise in Texas" to obtain a Texas certificate of registration. Proposed subsection (c) clarifies that the performance of a service under the Act at a place of business or temporary location in Texas is required to trigger the registration requirements. Specifically, advertisements in Texas and/or websites alone do not trigger the Texas talent agency registration requirements without the performance of any service described under the Act at a Texas location for Texas artists.

Proposed §78.20(d) clarifies registration requirements for persons who operate as a talent agency, as defined under the Act, from a temporary location in Texas. The proposed rule requires such persons to register their out-of-state principal place of business and submit the name, address, and telephone number of their registered agent.

Existing §78.20(d) is deleted in its entirety because an applicant's affirmation of reading and being familiar with Chapter 2105 is unnecessary; compliance with the law is required.

Proposed §78.20(e) clarifies the existing rule to state that a certificate of registration is not transferable to another person, adds a definition for "change of ownership" for clarification, and deletes the word "assignable" as duplicative of the existing language that prohibits the transfer of a certificate of registration.

Proposed §78.20(f) adds a provision clarifying that a talent agency that relocates to a new location must obtain a revised/duplicate registration prior to operating at the new location. This informs talent agencies of their obligations in registering each talent agency location and also clarifies that a location transfer is not a prohibited transfer of a certificate of registration.

Existing §78.20(f) is deleted in its entirety because it is unnecessary; compliance with the law is required.

Proposed §78.20(g) clarifies that applicants using an assumed name must comply with the Texas Business and Commerce Code, Chapter 36 as amended. The additional language clarifies license holders' on-going responsibilities under that law.

Existing §78.20(g) is deleted in its entirety. Providing copies to the department of a talent agency's registration with the Secretary of State and county clerks is unnecessary.

A proposed amendment to §78.21 re-titles this section to include "renewals" in accordance with a concurrently proposed repeal of §78.22, relating to renewal registrations.

Existing §78.21(a) is deleted in its entirety. The application form will require signature(s) of the talent agency owner(s).

Existing §78.21(b)(1) is deleted in its entirety. The application form will require identifying information of the talent agency owner(s).

Existing §78.21(b)(2) and (3) are deleted from registration requirements. The concept of disclosure of a talent agency owner's financial interest in video productions, photograph studios, and acting and modeling schools, etc. is relocated from the registration requirements and moved to consumer disclosure requirements, in concurrently proposed §78.70(b), relating to registrant responsibilities.

Existing §78.21(b)(4) is deleted because the requirement for talent agencies to file a schedule of commissions and fees with the department is concurrently proposed for repeal under §78.71.

Proposed §78.21(a) identifies the criteria to obtain an initial talent agency certificate of registration. The requirement to submit a business's assumed name documents is pursuant to existing §78.20(e) relating to compliance with the Assumed Business or Professional Name Act.

Proposed §78.21(b) creates a section to state the criteria to obtain a renewal certificate of registration. The proposed criteria for a renewal registration are to complete a department-approved renewal form, submit proof that the talent agency's bond is in good standing and has not been canceled, and submit a fee in accordance with §78.80. The requirement to submit proof of a bond in good standing ensures compliance with the existing surety bond requirements of the Act and the chapter.

Proposed §78.21(c) is language relocated from existing §78.74(a), relating to the requirement for a talent agency to submit a change of information within 30 days of the change. Also, the proposed rule adds references to specific types of information changes, such as a change of ownership and a change of location, which have different timelines within the chapter to submit changes of information.

Proposed §78.21(d) is language relocated without substantive change from existing §78.74(b), relating to the requirement for a talent agency to obtain a revised registration when information on the face of the registration changes.

Existing §78.22 is repealed. Renewal registration requirements are concurrently proposed under §78.21. The existing provision relating to submitting a change in information is relocated to concurrently proposed §78.21(b).

An amendment to existing §78.30(1) clarifies an exemption for a parent to provide talent agency services to the parent's own minor child without obtaining a talent agency registration. Unless otherwise provided by a court order, a parent is the lawful representative of the parent's minor child.

Existing §78.30(2) is deleted in its entirety. The Act does not authorize an exemption for labor unions. If a labor union, or any person under any name or title, is in the business of performing services of a talent agency as described under the Act, then a certificate of registration is required.

Proposed §78.30(2) deletes a reference to operating "a talent agency in conjunction with a person's own business" as duplicative to the existing language in that section for a business to obtain artists for the exclusive purpose of employment in that business.

Existing §78.30(4) is deleted in its entirety. The Act does not authorize an exemption for attorneys. If the attorney, or any person under any name or title, is in the business of performing services of a talent agency as described under the Act, then a certificate of registration is required.

A proposed amendment to §78.40 re-titles this section to state "financial" security requirements, without substantive change.

Proposed §78.40(a) clarifies the existing term "continuous" to specifically state that a bond must be effective for the entire time period of the registration and for a period of two years from the date the talent agency ceases to hold a valid and active registration. This language is a restatement of §2105.052(c) and §2105.106 of the Act.

Proposed §78.40(c) imposes a duty on valid and active talent agency certificate holders to, prior to the date the agency ceases to hold a valid and active registration, submit proof a surety bond is effective for two years after to the date that the talent agency will cease to hold a valid and active registration.

Existing §78.40(c) is deleted in its entirety. The Act does not allow an applicant to submit a cash performance alternative in lieu of a surety bond.

Proposed §78.40(d) reorganizes the enforcement provision for failing to maintain a bond, without substantive change.

Proposed §78.70(a) substitutes the word "and" for the existing word "or" in requiring talent agency publications "and" advertisements to state the talent agency's registered name, address, and registration number.

Existing §78.70(b) is deleted in its entirety. Proposed §78.20 state the registration requirements for out-of-state talent agencies. Specifically, an out-of-state talent agency that performs services described under the Act from a place of business or temporary location in Texas must obtain a Texas certificate of registration, in accordance with the Act and chapter.

Proposed §78.70(b) clarifies that a talent agency may charge for a product or service so long as the fee is not a condition of registration or representation. Pursuant to §2105.201(b)(1) of the Act, a talent agency may not charge, as a condition of registering an applicant or representing an artist a registration or advance fee. The proposed subsection (b) clarifies that so long as the charge is not a condition of registration or representation, then a talent agency may charge a fee for a service or product. Also, proposed subsection (b) relocates from existing §78.21(b)(1) to this section, a talent agency's financial interest disclosure requirement and provides information to artists under §2105.201 and §2105.202 of the Act.

Proposed §78.70(c) adds a disclosure requirement for talent agencies to disclose on every contract with an artist, the name, address and telephone number of the department with a statement that the talent agency is regulated by the department. This informs artists that talent agencies are regulated in Texas.

Proposed §78.70(d) is relocated language from existing §78.71(d) requiring talent agencies to provide to artists the amounts of commissions and fees to be charged to an artist. Proposed §78.70(d) adds that a talent agency's commissions and fees must be stated within an artist's contract and a concurrent proposed repeal of §78.71 removes the requirement for talent agencies to file a schedule of commissions and fees with the department.

Section 78.71 is proposed for repeal in its entirety. This proposal means that talent agencies would no longer be required to file a schedule of commissions and fees with the department. Concurrently proposed §78.70(d) requires a talent agency to disclose the commissions and fees a talent agency charges an artist in the artist's contract. Existing §78.71(e), requiring an artist to be provided a copy of the signed contract is also included in concurrently proposed §78.70(d). Existing §78.71(f) is relocated to proposed §78.72(c) and clarified.

A proposed amendment to the title of §78.72 is a grammatical change to add the word "the."

Proposed §78.72(a) clarifies the number of days in which a talent agency must deposit monies received from a client on behalf of an artist to proposed language of 7 calendar days because calendar days are easier to count than the existing "banking" days.

Proposed §78.72(b) deletes the phrase "unless a written contract to the contrary exists" because §2105.105 of the Act requires the department to determine by rule the disbursements of funds. Also, proposed §78.72(b) clarifies the number of days in which a talent agency must disburse monies owed to an artist to proposed language of 14 calendar days because calendar days are easier to count than the existing "banking" days. Also, the proposed amendment includes relocated language from existing §78.75(d) requiring that a talent agency's disbursement of monies shall include a written statement of the specific nature and amount charged to the artist.

Proposed §78.72(c) is relocated language from existing §78.71(f) that is clarified to require a talent agency's disclosure of the terms of agreement(s) between the talent agency and client(s), pertaining to the artist, within 48 hours of the artist's request.

Section 78.74 is proposed for repeal in its entirety because the responsibilities existing in this section are concurrently proposed in §78.21(b) and (c), without substantive change. This repeal and the concurrently proposed rule organizes the registration requirements for better understandability.

Existing §78.75(a) is deleted in its entirety. Concurrently proposed §78.75(a) conforms to statutory language under §2105.201(b)(1) of the Act and adds examples that are pertinent to the industry. The examples given mirror the statutory standard under §2105.201(b)(1).

Existing §78.75(b) is deleted in its entirety. The topic of splitting or sharing fees is concurrently addressed in proposed §78.75(b) and clarifies the language to conform to statutory language under §2105.201(b)(2) of the Act.

Existing §78.75(c) is deleted in its entirety. The Act and concurrently proposed rules in this chapter address a talent agency's collection of monies from an artist.

Proposed §78.75(c) is a restatement of §2105.202 of the Act, added to the chapter for emphasis in stating a talent agency's prohibited acts.

Existing §78.75(d) is deleted in its entirety because the topic is relocated to concurrently proposed §78.72(b).

Existing §78.75(e) is deleted in its entirety. The Act and concurrently proposed rules in this chapter address a talent agency's collection of monies from an artist.

Proposed §78.80(a) restates a talent agency's annual certificate of registration requirement. Under existing §78.80(a) and (b), the amounts of $100 and $300, respectively, are currently charged for a talent agency's filing fee and annual certificate of registration. Proposed §78.80(a) groups these fees together for a single fee of $400, without substantive change.

Also, without change, proposed §78.80(b) adds clarification that renewal registrations are $400. This is not a change from the previously imposed amount for the "annual" registration.

Proposed §78.80(c) reduces the fee for updating certificates of registrations and obtaining a duplicate registration. Under existing §78.82(a) and (b), concurrently proposed for repeal, the charge for filing an updated registration is $100 and the change for printing a duplicate registration is $25, respectively. Proposed §78.80(c) simplifies this process to one fee and reduces the fee to $25 for a "revised/duplicate" registration. The remainder of the section is relettered accordingly without substantive change.

Section 78.82 is proposed for repeal in its entirety because updated and duplicate registrations are addressed in concurrently proposed in §78.80(c). This repeal and the concurrently proposed rule under §78.80(c) reorganize the fee requirements for better understandability.

Proposed §78.90(a) is clarified without substantive change.

Proposed §78.90(b) adds that a talent agency that holds two or more certificates of registration for multiple talent agency locations may have all talent agency location registrations included within a proceeding to impose administrative sanctions and/or penalties. This proposed rule provides notice to talent agencies that the talent agency owner's violations arising from acts from one of the owner's talent agency locations may effect the talent agency owner's ability to hold a certificate of registration at other locations in Texas.

Section 78.100 is proposed for repeal in its entirety because explanations of the parties' contractual rights are more fully addressed under the Act and contract law.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments and repeal are in effect there will be no cost to state or local government as a result of enforcing or administering the proposal.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments and repeal are in effect, the public benefit will be rules that will clarify registration requirements under the Act for both in-state and out-of-state persons operating a talent agency in Texas; to improve existing talent agency disclosures to artists; to clarify prohibited registration and advance fees under the Act; and to generally clarify the rules for better readability and compliance.

Mr. Kuntz has determined that there will be an incidental economic effect on large, small, or micro-businesses as a result of the proposed amendments and repeal. There is an incidental increase in costs to talent agencies to modify their existing talent agency contracts to comply with the proposed amendments and repeal. There may be an incidental loss to talent agencies that host open model calls for out-of-state talent agencies under existing §78.70(b) by requiring a person who acts as a talent agency in Texas, including an out-of-state talent agency, to obtain a Texas registration. There may be an incidental reduction in costs for talent agencies to no longer file a commission and fee schedule. There is a reduction in cost for talent agencies to obtain a revised or duplicate registration.

Comments on the proposal may be submitted to Tamala Fletcher, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: tamala.fletcher@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

16 TAC §§78.1, 78.10, 78.20, 78.21, 78.30, 78.40, 78.70, 78.72, 78.75, 78.80, 78.90

The amendments are proposed under Texas Occupations Code, Chapter 2105, which authorizes the Department to adopt rules as necessary to implement this chapter and to set application and registration fees in amounts that are reasonable and necessary to defray the costs of administering this chapter.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 2105. No other statutes, articles, or codes are affected by the proposal.

§78.1. Authority.

These rules are promulgated under the authority of the Texas Occupations Code, Chapters [~~Chapter~~] 51 and 2105[~~, and the Texas Occupations Code, Chapters 51 and 53~~].

§78.10. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--Texas Occupations Code, Chapter 2105.

(2) [~~(1)~~] Artist--An [~~an~~] actor or a model, as they are defined in the Act [~~Texas Occupations Code, Chapter 2105~~].

(3) Financial interest--Either an equity ownership in or receiving compensation from a business enterprise.

(4) Owner--A sole proprietor or each person who directly or indirectly owns or controls 10 percent or more of the partnership or the outstanding shares of stock.

[~~(2) Mother agency--a talent agency that enters into an agreement with an artist to try to find employment or representation in markets other than the state of Texas, and also enters into an agreement with an out-of-state agency to find artists for it. The mother agency collects a fee from the artist only when the artist performs work booked by the mother agency. The out-of-state agency pays the mother agency a share of the commission withheld from the artist's fees for all work performed through the out-of-state agency.~~]

[~~(3) Open model call--a model call that is advertised to the public, inviting both models and anyone desiring to become a model, and that is no limited to the models currently under contract to a talent agency.~~]

(5) [~~(4)~~] Talent agency location--A person's place(s) of business in Texas from which services described under the Act are performed or, for an out-of-state talent agency that performs services described under the Act from a temporary location in Texas, the out-of-state principal place of business. [~~an office or other physical location from which the talent agency operates all aspects of its operations. A location within the municipality or metropolitan area in which the talent agency is licensed which is used no more than two consecutive days during a six month period to hold a model call is not considered a talent agency location for purposes of registration under Texas Occupations Code, Chapter 2105.~~]

§78.20. Registration Requirements--General.

(a) Unless exempted [~~in §78.30 of this title (relating to Exemptions)~~], all talent agencies as defined by the Act [~~that have a place of business in Texas, or advertise in Texas, and obtain or attempt to obtain employment for artists in Texas, or recruit artists from a temporary location in Texas,~~] must obtain a certificate of registration for each talent agency location. A Texas registrered talent agency may operate from a temporary location in Texas. [~~in order to operate a talent agency. "Personal agents", or any persons under any name or title, who perform the services described in Texas Occupations Code, Chapter 2105, as any part of the services they provide, are talent agents under Texas Occupations Code, Chapter 2105.~~]

(b) A talent agency is a person by any name or title who is in the business of performing the services described under the Act and performs those services from a place of business or a temporary location in Texas.

(c) Advertisements placed in Texas and/or websites do not trigger the Texas talent agency registration requirements without the performance of a service described under the Act at a place of business or temporary location in Texas.

(d) A person located outside of Texas that performs services described under the Act from a temporary location in Texas shall register their out-of-state principal place of business and shall submit the name, address, and telephone number of their registered agent.

[~~(b) Unless exempted by §78.30 of these rules, any person, partnership, corporation, or association that advertises a model call or casting call, or implies in any advertisement that employment as an artist or representation by an agent might be obtained by responding to such advertisement is a talent agency and must be registered under the provisions of Texas Occupations Code, Chapter 2105.~~]

(e) [~~(c)~~] A certificate of registration is not [~~assignable or~~] transferable to another person. If a talent agency changes ownership, the new owner must apply for a new certificate of registration and comply with the requirements of the Act and this chapter prior to operating the talent agency. Change of ownership is defined as: [~~.~~]

(1) For a sole proprietorship, the licensee no longer owns and/or operates the talent agency.

(2) For a partnership, the partnership is dissolved.

(3) For a corporation, the corporation is sold to another person or entity. A change of ownership does not include corporate officer or stockholder restructuring.

(4) Legal incompetence or death.

[(d) All applications shall include a statement that all owners, partners, members of associations, trustees, or fiduciaries, have read and are familiar with the provisions of Texas Occupations Code, Chapter 2105.]

(f) A talent agency that relocates, without a change in ownership, must obtain a revised/duplicate certificate of registration and pay a fee in accordance with §78.80 of this chapter prior to operating the talent agency at the new location.

(g) [(e)] Any talent agency using an assumed name(s) must comply with the Assumed Business or Professional Name Act, Texas Business and Commerce Code, Chapter 36 as amended.

[(f) Any incorporated talent agency must comply with the Texas Business Corporation Act, Article 2.05.]

[(g) The talent agency must furnish a copy of all registrations filed with the clerk of the county in which the talent agency is located, or the registration filed with the Secretary of State. A copy of any changed or revised registrations must be furnished to the department within 30 days of filing.]

§78.21. Registration and Renewal Requirements--[New] Certificates of Registration.

(a) To obtain an initial talent agency certificate of registration, an applicant must:

(1) submit a completed application on a department-approved form;

(2) submit a surety bond in accordance with the Act and this chapter;

(3) if using an assumed name, submit documents under the Assumed Business or Professional Name Act, Texas Business and Commerce Code, Chapter 36; and

(4) pay the fee required under §78.80 of this chapter.

(b) To obtain a renewal talent agency certificate of registration, an applicant must:

(1) submit a completed application on a department-approved form;

(2) submit proof that the talent agency had a surety bond continuously in effect for the preceding registration period by providing a letter directly from the bonding company to the department that states the initial issuance date of the talent agency's surety bond with a statement that the bond is in good standing and has been in good standing continuously since the bond's initial issuance; and

(3) pay the fee required under §78.80 of this chapter.

(c) Unless relating to a change of ownership, a change of location, or otherwise provided in this chapter, any change of information must be furnished to the department within 30 days of the change or revision.

(d) If any information that appears on the face of the certificate of registration changes, the talent agency must obtain a revised/duplicate certificate of registration by returning the outdated certificate and paying the fee required under §78.80 of this chapter.

[(a) The application must be signed by the applicant. The application must be signed by each officer if a corporation, each partner if a partnership, each member if an association, or each trustee or fiduciary as applicable.]

[(b) An initial application must contain:]

[(1) the complete names, social security numbers, dates of birth, addresses, and phone numbers of all persons owning at least 10 percent of the talent agency. If the talent agency is a partnership, the names of all partners must be included. If the talent agency is a limited partnership, the names of all general and limited partners must be included, along with the name and address of the registered agent. If the talent agency is a corporation, the names of the corporate president, vice president, secretary and treasurer must be included. The percent ownership interest must be stated in all cases;]

[(2) the names of any talent agency owners who have a financial interest in any company involved in the casting, production or distribution of motion pictures or television motion pictures, independent video production companies, recording studios, photography studios, or any other companies or firms which would hire artists from time to time. This disclosure shall include the company or companies in which he has a financial interest, and the percent of ownership in each company listed. Such an interest shall not, in and of itself, be grounds for registration denial, suspension or revocation;]

[(3) the names of any talent agency owners who have a financial interest in any school or course of instruction which is primarily intended for the professional study of acting or modeling. This disclosure shall include the school or course name and the percent of ownership held. Any person owning and/or operating a modeling or acting school must comply with the provisions of Texas Education Code, Chapter 132, and the Texas Workforce Commission Rules for proprietary schools as they appear in 40 Texas Administrative Code, Chapter 807; and]

[(4) a schedule of commissions and/or fees charged.]

§78.30. Exemptions.

The term "talent agency" does not apply to:

(1) a person who obtains or attempts to obtain employment for himself or herself or the person's minor child.

[(2) an organized labor union that represents artists and whose efforts to obtain or attempt to obtain employment for its members is incidental to representing its members.]

(2) [(3)] [a person who, without assessing a fee, operates a talent agency in conjunction with the person's own business, or as the authorized representative for] a bona fide employer, for the exclusive purpose of employing artists for use [in or for that business, or] by that employer.

[(4) attorneys licensed to practice who represent artists, strictly as legal advisors and not as managers.]

§78.40. Financial Security Requirements.

(a) Surety bonds furnished in compliance with the Act [Texas Occupations Code, Chapter 2105] shall be effective for the entire time period of the registration [continuous] and for a period of two years from the date the talent agency ceases to hold a valid and active registration. The bond shall provide for the issuing company to give the department 30 days written notice of cancellation.

(b) The surety bond shall be issued by a company authorized to do business in the State of Texas, conform to the Texas Insurance Code, and be on a form provided by the department.

(c) Prior to the date that a talent agency ceases to hold a valid and active registration, a talent agency must submit proof of a surety bond in the amount of $10,000 payable to the State of Texas to be effective for a period of two years from the date the talent agency ceases to hold an valid and active registration.

[(c) An owner may deposit a cash performance alternative of $10,000 in lieu of the bond. The cash performance alternative shall be an irrevocable assignment of security issued by a national or state bank, or savings and loan association, subject to the express approval of the executive director. Each assignment or cash deposit shall remain in effect for a period of three (3) years, beginning with the date of issuance of the certificate of registration. Forms for filing an assignment of security shall be provided by the department upon request.]

(d) Failure to maintain the bond [or assignment] for the entire time period required by this section and the Act [Texas Occupations Code, Chapter 2105] will be cause for the executive director to institute action to impose administrative and/or civil sanctions and penalties [request an administrative hearing to suspend or revoke the talent agency's certificate of registration].

§78.70. Responsibilities of the Registrant--General.

(a) All talent agency publications and [or] advertisements, including but not limited to, circulars, newspapers, periodicals, yellow page ads, brochures, business cards, contracts and receipts shall state [contain] the registered name, address and registration number of the talent agency.

(b) A talent agency that offers a service or product that is not a condition of registration or representation shall disclose, in a written contract signed by both the talent agency and the artist, that such purchase is not required for the talent agency's registration or representation of the artist. The agreement must also disclose each talent agency owner's financial interest in a person providing the product or service, if different from the talent agency's owners.

(c) A talent agency's contract for an artist's purchase of a product or service offered by the talent agency shall include the following information: "Regulated by the Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, 1-800-803-9202, 512-463-6599; website: www.license.state.tx.us/complaints."

(d) The talent agency shall provide an artist who uses the services of a talent agency a copy of the signed contract that includes a statement of the commissions and/or fees that will be charged to the artist.

[(b) Any talent agency acting as host for an open model call for an out-of-state agency in expectation of signing either regular or "mother" agency contracts with artists, may only do so for a single out of state agency at a time. The talent agency registered in Texas shall be responsible for:]

[(1) publishing both the Texas registration number and the out-of-state registration number, if applicable, in all advertisements;]

[(2) providing a commission or fee schedule of the out-of-state agency to the department at least five days before the open model call is held; and]

[(3) adherence to all provisions of Texas Occupations Code, Chapter 2105 and rules by the out-of-state agency for the open model call.]

§78.72. Responsibilities of the Registrant--Treatment of Monies.

(a) A talent agency that receives any payment of monies from a client on behalf of an artist shall, within seven calendar [five banking] days, deposit that amount in an account maintained by the talent agency in a federally insured financial institution. This subsection does not prohibit the practice of "check swapping" as that term is commonly used in the talent agency industry.

(b) All [Unless a written contract to the contrary exists, all] monies received from a client that are owed to [on behalf of] an artist must be disbursed to that artist no later than fourteen calendar [ten banking] days after receipt by the talent agency, including a written statement of the specific nature and amount charged to the artist.

(c) Within 48 hours of an artist's request, a talent agency shall disclose to the artist, in writing, the terms of all agreements between the talent agency and a client that relate to the artist's employment with the client, including the nature and amount of all monies received from the client.

§78.75. Responsibilities of the Registrant--Prohibited Acts.

(a) A talent agency may not charge, as a condition of registering an applicant or representing an artist, a registration or advance fee. Fees for websites, photographs, training workshops, and other similar products and/or services may not be charged to an artist as a condition of registering with or obtaining representation by a talent agency.

(b) A talent agency may not split or share fees with any person who is not registered under the Act.

(c) A talent agency may not require an applicant to subscribe to or use a specific publication, video or audio tape, postcard service, advertisement service, resume service, photographer, or acting or modeling school or workshop.

[(a) Regardless of its refund policy, a talent agency may not charge an artist any fee. or charge, other than reimbursement of amounts actually paid by the talent agency on behalf of the artist, before the artist has accepted an offer of employment obtained through a referral made by the talent agency.]

[(b) A talent agency may not split or share fees with any person who is required to be but is not registered under Texas Occupations Code, Chapter 2105 as a talent agency.]

[(c) A talent agency may require an artist to reimburse it for legitimate expenses owed to third parties if:]

[(1) the expenses were incurred as a result of efforts made on the behalf of the artist by the talent agency; and]

[(2) the talent agency has obtained, in advance, in writing the express permission of the artist to incur such expenses.]

[(d) When the talent agency bills the artist it must provide the artist an itemized statement of the nature of the charges and a copy of the invoice or receipt.]

[(e) Expenses such as utility costs, local telephone service, and other similar indirect costs shall not be recovered from the artist.]

§78.80. Fees[--Original Registration and Renewal].

(a) Initial [Annual] certificate of registration application [filing] fee--$400 [$100.]

(b) Renewal [Annual] certificate of registration application fee--$400 [$300.]

(c) Revised/duplicate certificate of registration--$25

(d) [(c)] All fees are non-refundable.

(e) [(d)] Late renewal fees for certificates issued under this chapter are provided for under §60.83 of this title (relating to Late Renewal Fees).

§78.90. Sanctions--Administrative Sanctions/Penalties.

(a) If a person violates the Act [~~Texas Occupations Code, Chapter 2105~~], or a rule or order adopted or issued by the commission or executive director [~~commissioner~~] relating to the Act [~~Texas Occupations Code, Chapter 2105~~], the executive director may institute proceedings to impose administrative sanctions and/or recommend administrative penalties in accordance with Government Code, Chapter 2001, Texas Occupations Code, Chapter 51, and Chapter 60 of this title [~~(relating to Texas Commission of Licensing and Regulation)~~].

(b) When a talent agency holds two or more certificates of registration for multiple talent agency locations, a proceeding to impose sanctions and/or recommend administrative penalties may include all talent agency locations owned by that talent agency.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603569
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 463-6208

♦ ♦ ♦

16 TAC §§78.22, 78.71, 78.74, 78.82, 78.100

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Licensing and Regulation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Occupations Code, Chapter 2105, which authorizes the Department to adopt rules as necessary to implement this chapter and to set application and registration fees in amounts that are reasonable and necessary to defray the costs of administering this chapter.

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapters 51 and 2105. No other statutes, articles, or codes are affected by the proposed repeal.

§78.22. Registration Requirements--Renewal.

§78.71. Responsibilities of the Registrant--Schedules of Commissions and Fees.

§78.74. Responsibilities of the Registrant--Registration Statement.

§78.82. Fees--Updated or Duplicate Registration.

§78.100. Technical Requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603570
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 463-6208

♦ ♦ ♦

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 100. CHARTERS

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING OPEN-ENROLLMENT CHARTER SCHOOLS

DIVISION 6. CHARTER SCHOOL OPERATIONS

19 TAC §100.1207

The Texas Education Agency (TEA) proposes an amendment to §100.1207, concerning open-enrollment charter schools. The section addresses student admission procedures. The proposed amendment would set forth provisions concerning student admission and enrollment for charter schools specializing in performing arts.

The Texas Education Code (TEC), Chapter 12, Subchapter D, authorizes the commissioner of education to adopt rules and procedures relating to the implementation of open-enrollment charter schools. Previously, the TEC, §12.111(a)(6), required that charter schools "prohibit discrimination in admission policy on the basis of sex, national origin, ethnicity, religion, disability, academic, artistic, or athletic ability, or the district the child would otherwise attend...." House Bill (HB) 1111, 79th Texas Legislature, 2005, amended the TEC, §12.111(a)(6), to permit charter schools specializing in performing arts to have admissions policies that require students to demonstrate artistic ability. The bill also added new TEC, §12.1171, to permit these schools to require applicants to audition for admission. Accordingly, current commissioner rule (19 TAC §100.1207) must be amended to permit charter schools specializing in performing arts to admit students based on artistic ability.

The proposed amendment to 19 TAC §100.1207 would modify subsection (d) to allow for this admission and enrollment exception for these specialized charter schools. The proposed amendment would add a new subsection (e) that sets forth the provisions concerning student admission and enrollment for charter schools specializing in performing arts. The proposed new subsection (e) would provide a definition of a "charter school specializing in performing arts" and describe allowable components, in addition to the required academic curriculum, that could be included in an educational program that has an emphasis in one or more of the performing arts. The proposed new subsection (e) would also address requiring students to demonstrate interest or ability in the performing arts or to audition for admission. Other existing non-discrimination provisions and eligibility criteria relating to admission and enrollment would continue to apply.

Ernest Zamora, Associate Commissioner for Support Services, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Dr. Zamora has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment would be to provide information and guidance concerning the permissibility of charter schools specializing in performing arts to admit students based on artistic ability or audition. There will be no effect on small

businesses. There is no anticipated economic cost to persons who are required to comply with the amendment.

The public comment period on the proposal begins July 14, 2006, and ends August 13, 2006. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code, Chapter 12, Charters, Subchapter D, Open-Enrollment Charter School, which authorizes the commissioner of education to adopt rules and procedures related to the implementation of open-enrollment charter schools.

The amendment implements the Texas Education Code, §12.111 and §12.1171, as amended and added by HB 1111, 79th Texas Legislature, 2005.

§100.1207. Student Admission.

(a) - (c) (No change.)

(d) Student admission and enrollment. Except as provided by this section, the [~~The~~] governing body of the charter holder must adopt a student admission and enrollment policy that:

(1) (No change.)

(2) specifies any type of non-discriminatory enrollment criteria to be used at each charter school operated by the charter holder. Such non-discriminatory enrollment criteria may make the student ineligible for enrollment based on a history of a criminal offense, a juvenile court adjudication, or discipline problems under Texas Education Code (TEC), Chapter 37, Subchapter A, documented as provided by local policy.

(e) Student admission and enrollment at charter schools specializing in performing arts. In accordance with the TEC, §12.111 and §12.1171, a charter school specializing in performing arts, as defined in this subsection, may adopt a student admission and enrollment policy that complies with this subsection in lieu of compliance with subsections (a) - (d) of this section.

(1) A charter school specializing in performing arts as used in this subsection means a school whose open-enrollment charter includes an educational program that, in addition to the required academic curriculum, has an emphasis in one or more of the performing arts, which include music, theatre, and dance. A program with an emphasis in the performing arts may include the following components:

(A) a core academic curriculum that is integrated with performing arts instruction;

(B) a wider array of performing arts courses than are typically offered at public schools;

(C) frequent opportunities for students to demonstrate their artistic talents;

(D) cooperative programs with other organizations or individuals in the performing arts community; or

(E) other innovative methods for offering performing arts learning opportunities.

(2) To the extent this is consistent with the definition of a "public charter school" under the NCLB, as interpreted by the USDE, the governing body of a charter holder that operates a charter school specializing in performing arts may adopt an admission policy that requires a student to demonstrate an interest or ability in the performing arts or to audition for admission to the school.

(3) The governing body of a charter holder that operates a charter school specializing in performing arts must adopt a student admission and enrollment policy that prohibits discrimination on the basis of sex, national origin, ethnicity, religion, disability, academic or athletic ability, or the district the child would otherwise attend under state law.

(4) The governing body of a charter holder that operates a charter school specializing in performing arts must adopt a student admission and enrollment policy that specifies any type of non-discriminatory enrollment criteria to be used at the charter school. Such non-discriminatory enrollment criteria may make the student ineligible for enrollment based on a history of a criminal offense, a juvenile court adjudication, or discipline problems under TEC, Chapter 37, Subchapter A, documented as provided by local policy.

(f) [~~(e)~~] Maximum enrollment; transfers. Total enrollment shall not exceed the maximum number of students approved in the open-enrollment charter. Students who reside outside the geographic boundaries stated in the open-enrollment charter shall not be admitted to the charter school until all eligible applicants who reside within the boundaries and have submitted a timely application have been enrolled. Then, if the open-enrollment charter so provides, the charter holder may admit transfer students to the charter school in accordance with the terms of the open-enrollment charter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603566
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 475-1497

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS

CHAPTER 1. ARCHITECTS

SUBCHAPTER G. COMPLIANCE AND ENFORCEMENT

22 TAC §§1.122 - 1.124

The Texas Board of Architectural Examiners proposes amendments to §§1.122, 1.123 and 1.124 of Chapter 1, Subchapter G, Title 22, pertaining to compliance and enforcement.

The proposed amendments to §1.122 which specifies requirements for an architect to jointly provide architectural services with a non-registrant would make the rule applicable to associations between architectural firms and non-registrants. The

proposed revisions would exclude from the section's requirements subcontracting and consulting agreements entered into between architects or their firms and non-registrants working for a client. The proposal repeals provisions that require the mandated written contract of association to include the termination date of the association, and information about whether the association exists for only one project. The proposal corrects an obsolete cross-reference to the architects' registration law and modifies a requirement relating to records retention to conform to the generally applicable records retention requirement stated elsewhere in the rules.

The proposed amendment to §1.123, relating to title usage, prohibits any person who is not 1) registered as an architect and licensed as a professional engineer or 2) a licensed professional engineer who holds a degree in architectural engineering from using the title "architectural engineer" or any form of the term "architectural engineering" to refer to the services the person offers or renders. The proposed amendment more specifically states the Board's current enforcement authority regarding restrictions on the use of a title of business or profession including any form of the word "architect."

The proposed amendment to §1.124 revises the business registration process. As amended, a principal of an architectural firm or other business entity that offers or renders architectural services in Texas must annually register the firm or business entity with the Board. An architect or the principal of an architectural firm that enters into an agreement of association created under §1.122 as amended must annually register the business association with the Board. The architect, either as a principal of an architectural firm or as the architect who enters into an agreement of association, must register the business or association within 30 days after its creation. Likewise, the architect must notify the Board within 30 days after the business entity or association dissolves or otherwise becomes unable to offer or render architectural services. Pursuant to the proposed rule, a business or an association would be prohibited from offering or rendering architectural services after the Board receives such notice, unless another architect registers the firm or business within that 30-day period.

The proposed revisions to §1.122 and §1.124 formalize agreements and state the circumstances under which an unlicensed person and an architect or architectural firm may jointly provide architectural services. The proposals would also enable the Board to maintain information upon firms, businesses, and associations that may lawfully offer architecture. The purpose for both proposals is to ensure that business entities which offer or render architectural services do so only by and through registered architects.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended section is in effect, a significant fiscal impact resulting from the proposed amendments is not anticipated. The revisions to §1.124 will provide data that is currently filed with the Board will be filed by architects and principals of architectural firms in lieu of the businesses themselves. The agency estimates a one-time fiscal impact of $20,000 in upgrading the agency's database to collect the information.

Restrictions on the use of the title "architectural engineer" in §1.123 as amended are not anticipated to create a significant fiscal impact. There are no fiscal implications for local government arising from the amendments to §§1.122 - 1.124.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the sections are in effect the public benefits expected as a result of the amendments are: 1) to ensure that the services provided through collaborative efforts between an architect or an architectural firm and non-registrants are provided by and through architects and 2) to ensure that the agency will have more comprehensive and up-to-date information on firms and business entities that may lawfully offer or render architectural services. The agency will therefore more easily identify firms and businesses that may not lawfully offer or render architectural services. The amendments to §1.122 and §1.124 have no effect upon small or micro-businesses because the amendments shift the responsibility for filing data with the Board currently imposed upon businesses and associations to individuals on behalf of the businesses and associations. There will be no cost to individuals required to comply with the rules arising from the amendments thereto. The amendment to §1.123 will benefit the public by providing specific notice of the qualifications one must hold in order to represent oneself by title or terminology as an "architectural engineer." The change is intended to protect the public from misleading representations. The amendment is a more specific implementation of pre-existing statutory restrictions on the use of any form of the title "architect" which prohibit one who is not an architect from using any form of the title "architect." There may be a cost to individuals required to comply with the rule arising from modifications to business cards, stationery, signage, etc. However, those persons who would be prohibited from using the title under the amendments to §1.123 are currently required to abstain from using an architectural title. Therefore, the cost is not attibutable to the proposed amendment. There are no fiscal implications for small or micro-businesses resulting from the amendment to §1.123.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to §1051.202, Texas Occupations Code Annotated, which grants authority to the Board to adopt rules necessary to administer or enforce the Architects' Registration Law; §1051.208, Texas Occupations Code Annotated, which requires the Board to adopt by rule standards of conduct for its registrants; §1051.306, Texas Occupations Code Annotated, which allows the Board to adopt rules requiring business entities that engage in the practice of architecture to register with the Board; §1051.601(c), Texas Occupations Code Annotated, which allows an engineer who has an architectural engineering degree to use the title "architectural engineer;" §1051.702, Texas Occupations Code Annotated, which prohibits a person who is not registered as an architect from engaging in the practice of architecture or offering or attempting to engage in the practice of architecture; §1051.703, Texas Occupations Code Annotated, which allows a firm, partnership, corporation, association to offer or engage in the practice of architecture or use the word "architect" or "architecture" in its name only if all architecture rendered on behalf of the firm is rendered by an architect; and §1051.801(a), Texas Occupations Code Annotated, which prohibits one who is not registered as an architect from engaging in, or offering or attempting to engage in, the practice of architecture and from using any form of the word "architect" in a title of profession or business.

The proposed amendments do not affect any other statutes.

§1.122. Association.

(a) An Architect or a Principal, on behalf of an architectural firm, who forms a business association[, ~~either formally or informally,~~] to jointly provide [~~offer~~] architectural services with any Nonregistrant who is:

(1) not an employee of the Architect or architectural firm;

(2) not a client of the Architect or architectural firm; and

(3) not a subcontractor nor a consultant of the Architect or architectural firm under contract with a client except as described in subsection (e); [~~individual who is not a duly registered Texas Architect or bona fide employee working in the same firm where the Architect is employed or with any group of individuals who are not duly registered Texas Architects~~] shall, prior to providing [~~offering~~] architectural services on behalf of the business association, enter into a written agreement of association with the Nonregistrant [~~nonregistrant(s)~~] whereby the Architect or the architectural firmagrees to be responsible for the preparation of all Construction Documents [~~prepared and~~] issued by the [~~for use in Texas pursuant to the agreement of~~] association. [~~All Construction Documents prepared and issued for use in Texas pursuant to the agreement of association shall be prepared by the Architect or under the Architect's Supervision and Control unless the Construction Documents are prepared and issued as described in subsection (e) of this section.~~]

(b) The [~~written agreement of association shall be signed by all parties to the agreement. In addition to the provisions of subsection (a) of this section, the~~] written agreement of association shall include [~~contain~~] the following:

(1) The date when the agreement to associate is effective; [~~and the approximate date when the association will be dissolved if such association is not to be a continuing relationship. If the association is to be a continuing relationship, that fact shall be so noted in the agreement. If the association is only for one project, the project shall be identified in the agreement of association by listing both the client's and the project's names and addresses.~~]

(2) The name, address, telephone number, registration number, and signature of the [~~each~~] Architect or the Principal on behalf of an architectural firm which [~~who~~] has agreed to associate with the Nonregistrant; [~~nonregistrant(s).~~]

(3) The name, address, telephone number, and signature of the Nonregistrant [~~each nonregistrant~~] with whom the Architect or Principal has agreed to associate.

(c) The Architect or Principal shall prepare or exercise Supervision and Control over the preparation of all Construction Documents issued by the association unless the Construction Documents are prepared and issued as described in subsection (e). All Construction Documents prepared pursuant to the association described in this section shall be sealed, signed, and dated in accordance with the provisions of Subchapter F.

(d) The Architect who seals Construction Documents on behalf of the association shall retain paper or electronic copies of them, together with the written agreement of association, and make them available for review by the Board for ten (10) years after the date of the Architect's signature on the Construction Documents. [~~Paper or microform copies of all Construction Documents resulting from the association, together with the written agreement of association, shall be retained by the Architect who sealed them and made available for review by the Board for ten (10) years from the date of substantial completion of each project.~~]

(e) If, pursuant to §1051.606(b) of the Texas Occupations Code, [~~Section 14.2 of the Act,~~] a Texas Architect associates with a person who is not a Texas Architect but is duly registered as an architect in another jurisdiction and does not maintain or open an office in Texas, The Texas Architect shall, at a minimum, exercise Responsible Charge over the preparation of all Construction Documents issued for use in Texas as a result of the association. The Texas Architect shall seal, sign, and date all Construction Documents issued for use in Texas as a result of the association in the same manner as if the Architect had prepared the Construction Documents or they had been prepared under the Architect's Supervision and Control. All other requirements of this section relating to associations apply to an association between an Architect and a person registered as an architect in another jurisdiction regardless of whether the Texas Architect or the architect from another jurisdiction acts as the "consultant" as that term is used in §1051.606(b) of the Texas Occupations Code. [~~The requirements of subsections (a), (b), and (d) of this section also must be satisfied. For purposes of subsections (a) and (b), the term "nonregistrant" shall include the non-Texas architect. The requirements of this subsection must be satisfied regardless of whether the Texas Architect or the non-Texas architect acts as the "consultant" as that term is used in Section 14.2 of the Act.~~]

§1.123. Titles.

(a) - (b) (No change.)

(c) A person may not use the title "architectural engineer" or use any form of the term "architectural engineering" to refer to services the person offers or renders, unless the person is:

(1) An Architect who is a licensed professional engineer; or

(2) A licensed professional engineer who holds a degree in architectural engineering.

(d) [~~(c)~~] No entity other than those qualified in subsections (a) and (b) of this section may use any form of the word "architect" or "architecture" in its name or to describe services it offers or performs in Texas.

(e) [~~(d)~~] A person enrolled in the Intern Development Program (IDP) may use the title "architectural intern."

§1.124. Business Registration.

(a) A Principal for an architectural firm or other [~~Unless excepted from the Act in accordance with Section 10 or Section 14 of the Act, each~~] business entity [~~or association~~] that offers or provides architectural services in Texas must annually register information regarding the firm or business entity with the Board [~~by submitting a completed business registration form accompanied by at least one duly executed Architect of Record affidavit. Blank business registration forms and Architect of Record affidavit forms may be requested by contacting the Board's office~~].

(b) An Architect or a Principal of an architectural firm who enters into an agreement to create a business association pursuant to section 1.122 shall annually register the association with the Board. [~~Once the Board has received a completed business registration form and a duly executed Architect of Record affidavit from a business entity or association, the Board shall enter the entity's or association's name into its registry of business entities and associations that are authorized to offer and provide architectural services in Texas.~~]

(c) If a business entity or association dissolves or otherwise becomes unable to lawfully offer or provide architectural services in Texas, the Architect or Principal who last registered the business entity or association shall [~~an Architect who has signed an Architect of Record affidavit ceases to provide architectural services on behalf of~~

the business entity or association for which the Architect signed the affidavit, the Architect must] so notify the Board in writing. Such notification must be postmarked or otherwise provided within thirty (30) days of the date of dissolution or the date the business entity or association became unable to lawfully offer or provide architectural services. [the Architect ceases to provide architectural services on behalf of the business entity or association.] A business entity or association may not continue to offer or provide architectural services unless another Architect or Principal files information with the Board identifying himself or herself as the Principal for the business entity or association within that thirty (30) day period.

[(d) Effective September 1, 2001, the Board may establish a business registration fee. All business entities required to register with the Board pursuant to the provisions of this section shall pay the business registration fee as prescribed by the Board.]

(d) [(e)] An Architect who is a sole proprietor doing business under his/her own name shall be exempt from the requirements of subsections (a) - (c) [(d)] of this section.

(e) An Architect or Principal who is subject to this section shall initially register a business entity or a business association within thirty (30) days after the creation of the business entity or the business association. Thereafter the annual registration renewal of the business entity or business association shall coincide with the Architect's or Principal's renewal of architectural registration.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603502
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

SUBCHAPTER H. PROFESSIONAL CONDUCT

22 TAC §1.144

The Texas Board of Architectural Examiners proposes amendments to §1.144 of Chapter 1, Subchapter H, Title 22, pertaining to dishonest practice. The proposal repeals a requirement that mandates certain advertisements of an architect's or an architectural firm's services must display the architectural registration number of the architect or any architect employed by or associated with the firm. The requirement applies only to advertising that appears in a telephone directory, email directory, web site, or newspaper. There does not appear to be any great benefit to the public health, safety, and welfare to impose this requirement on these forms of advertising. The proposal also would amend the rule to establish a standard for architects serving as expert witnesses. Under the proposed standard, an architect who acts as an expert witness would be subject to disciplinary action if he or she gives testimony with actual knowledge that it is false or receives payment contingent upon rendering a specific opinion.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections. Since serving as an expert witness is within the statutory definition of the practice of architecture and therefore within the jurisdiction of the agency, the agency may currently receive complaints arising from an architect's testimony as an expert witness. It is not anticipated that the proposed rule will have any effect on the number of complaints received, investigated, and prosecuted.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the sections are in effect the public benefits expected as a result of the amendment to the rule are the elimination of a requirement that appears to have little public benefit and is often overlooked by registrants. The public will benefit by establishing standards for architects to render objective, truthful testimony as an expert which standards are not unduly burdensome so that architects are deterred from serving as expert witnesses. There will be no impact on small businesses. There will be no cost to individuals required to comply with the rule.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to §1051.001(7)(F), Texas Occupations Code Annotated, which defines the term "practice of architecture" to include providing expert testimony for purposes of Chapter 1051, Texas Occupations Code Annotated, relating to the regulation of architecture; §1051.208, Texas Occupations Code Annotated, which requires the Board to adopt by rule standards of conduct for its registrants; §1051.752(6), Texas Occupations Code Annotated, which specifies that an architect is subject to disciplinary action for dishonest practices in the practice of architecture; and §1051.202, Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities.

The proposed amendment to this section does not affect any other statutes.

§1.144. Dishonest Practice.

(a) An Architect may not directly or indirectly perform an act, omit an act or allow an omission, make an assertion, or otherwise engage in a practice with the intent to:

(1) defraud,

(2) deceive, or

(3) create a misleading impression.

(b) An Architect may not advertise in a manner which is false, misleading, or deceptive. [Each advertisement that offers the service of an Architect in Texas and is found in a telephone directory, e-mail directory, web site, or newspaper must clearly display that Architect's Texas architectural registration number. If an advertisement is for a business that employs more than one Architect, only the Texas architectural registration number for one Architect employed by the firm or associated with the firm pursuant to section 1.122 is required to be displayed.]

(c) An Architect may not directly or indirectly solicit, offer, give, or receive anything or any service of significant value as an inducement or reward to secure any specific publicly funded architectural work.

(d) An Architect serving as an expert witness commits a dishonest practice upon:

(1) rendering testimony the Architect has actual knowledge is false; or

(2) agreeing to receive payment contingent upon giving testimony that expresses a particular opinion.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603503
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

22 TAC §1.152

The Texas Board of Architectural Examiners proposes new rule §1.152 in Chapter 1, Subchapter H, Title 22, pertaining to professional conduct. The proposed rule prohibits the Board's registrants from injuring or attempting to injure the professional reputation of another. The proposal allows a registrant to disclose dishonesty, recklessness, incompetence, or illegal conduct to the proper authorities. The proposed rule also allows a registrant to provide a discrete opinion of the services or work of another upon request of a client or prospective employer. The purpose of the rule is to discourage the Board's licensees from engaging in unprofessional conduct in the course of practicing the professions the Board regulates.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new section is in effect, there will be no significant fiscal impact for state government as a result of enforcing the proposed section. There will be no fiscal implications for local government as a result of enforcing or administering the sections.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the sections are in effect the public benefit expected as a result of the new rule would be to encourage productive and professional conduct in the design and construction of projects by design professionals regulated by the Board. There will be no impact on small or micro-businesses. There will be no cost to individuals required to comply with the rule.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The new rule is proposed pursuant to §1051.202, Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities; and pursuant to §1051.208, Texas Occupations Code Annotated, which requires the Board to establish standards of conduct for persons regulated by the Board.

The proposed new rule does not affect any other statutes.

§1.152. Malicious Injury to Professional Reputation.

An Architect may not maliciously injure or attempt to injure the professional reputation of another. However, an Architect may disclose a dishonest practice, recklessness, incompetence, or illegal conduct to the proper authorities or provide a frank but private appraisal of the services or work of a person or a business entity upon request by a client or a prospective employer.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603504
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

SUBCHAPTER L. HEARINGS--CONTESTED CASES

22 TAC §1.232

The Texas Board of Architectural Examiners proposes an amendment to §1.232 of Chapter 1, Subchapter L, Title 22, pertaining to hearings and contested cases. The proposed amendment changes cross-references to §1.122 and §1.124 and modifies the descriptions of the violations of those sections within the penalty matrix in §1.232. The changes reflect proposed changes to §1.122 and §1.124. The proposed amendment also corrects a cross-reference to the incorrect number of a rule regarding the removal of architectural seals from construction documents.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections. The proposed amendment specifies recommended sanctions for violations of substantive requirements in other sections. As such, the proposed amendments are not anticipated to either increase or decrease the agency's work load.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefit expected as a result of the amendment to the rule is to provide public notice of the possible sanction for failing to comply with the business association and registration rules. If the penalty matrix in §1.232 were not amended and the amendments to §1.122 and §1.124 were adopted, the penalty matrix would be inaccurate. The proposed amendments are not anticipated to have any impact on small or micro-business. The penalty matrix does not impose affirmative duties or prohibitions but specifies a range of sanctions for violating other rules. Therefore, there is no cost to individuals subject to the penalty matrix resulting from the amendments.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to §1051.202 and §1051.452(c), Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities and requires the Board to adopt an administrative penalty

schedule for violations of the laws enforced by the Board, respectively.

The proposed amendment to this section does not affect any other statutes.

§1.232. Board Responsibilities.

(a) - (i) (No change.)

(j) The Board and the administrative law judge who presides over the formal hearing in a Contested Case shall refer to the following guidelines to determine the appropriate penalty for a violation of any of the statutory provisions or rules enforced by the Board:
Figure: 22 TAC §1.232(j)

(k) - (m) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603505
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

CHAPTER 3. LANDSCAPE ARCHITECTS
SUBCHAPTER A. SCOPE; DEFINITIONS

22 TAC §3.5

The Texas Board of Architectural Examiners proposes an amendment to §3.5 of Chapter 3, Subchapter A, Title 22, pertaining to defined terms. The proposed amendment defines the term "principal" as a landscape architect who, either individually or with other landscape architects, is responsible for an organization's practice of landscape architecture. The definition specifies who is responsible as principal, among the landscape architects within an organization, for registering the organization with the Board as a landscape architecture association or other business entity that offers or renders landscape architecture.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefit expected as a result of the amendment is to clarify the class of landscape architects who, as "principal" on behalf of a business association or other business entity, must annually register the association or entity with the Board. Without the definition of the term "principal," the business association and registration requirements would be ambiguous. The proposed rule would have no impact on small or micro-businesses. There will be no cost to individuals required to comply with the rule.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to §1051.202, Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities; §1051.208, Texas Occupations Code Annotated, which requires the Board to establish by rule standards of conduct for its registrants; and §1051.306, Texas Occupations Code Annotated, which allows the Board to adopt rules requiring business entities that engage in the practice of landscape architecture to register with the Board.

The proposed amendment to this section does not affect any other statutes.

§3.5. Terms Defined Herein.

The following words, terms, and acronyms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (38) (No change.)

(39) Principal--A Landscape Architect who is responsible, either alone or with other Landscape Architects, for an organization's practice of Landscape Architecture.

(40) [~~(39)~~]Prototypical--From or of a landscape architectural design intentionally created not only to establish the landscape architectural parameters of a project but also to serve as a functional model on which future variations of the basic landscape architectural design would be based for use in additional locations.

(41) [~~(40)~~] Registrant--Landscape Architect.

(42) [~~(41)~~] Regulatory Approval--The approval of Construction Documents by the applicable Governmental Entity after a review of the landscape architectural content of the Construction Documents as a prerequisite to construction of a project.

(43) [~~(42)~~] Reinstatement--The procedure through which a cancelled, Surrendered, or revoked Texas landscape architectural registration certificate is restored.

(44) [~~(43)~~] Renewal--The procedure through which a Landscape Architect pays a periodic fee so that the Landscape Architect's registration certificate will continue to be effective.

(45) [~~(44)~~] Responsible charge--That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered landscape architects applying the applicable landscape architectural standard of care.

(46) [~~(45)~~] Rules and Regulations of the Board--22 Texas Administrative Code §§3.1 et seq.

(47) [~~(46)~~] Rules of Procedure of SOAH--1 Texas Administrative Code §§155.1 et seq.

(48) [~~(47)~~] Secretary-Treasurer--The member of the Board responsible for signing the official copy of the minutes of each Board meeting and maintaining the record of Board members' attendance at Board meetings.

(49) [~~(48)~~] SOAH--State Office of Administrative Hearings.

(50) [~~(49)~~] State Office of Administrative Hearings (SOAH)--A Governmental Entity created to serve as an independent forum for the conduct of adjudicative hearings involving the executive branch of Texas government.

(51) [~~(50)~~] Supervision and Control--The amount of oversight by a landscape architect overseeing the work of another whereby

(A) the landscape architect and the individual performing the work can document frequent and detailed communication with one another and the landscape architect has both control over and detailed professional knowledge of the work; or

(B) the landscape architect is in Responsible Charge of the work and the individual performing the work is employed by the landscape architect or by the landscape architect's employer.

(52) [~~(51)~~] Supplemental Document--A document that modifies or adds to the technical landscape architectural content of an existing Construction Document.

(53) [~~(52)~~] Surrender--The act of relinquishing a Texas landscape architectural registration certificate along with all privileges associated with the certificate.

(54) [~~(53)~~] Table of Equivalents for Experience in Landscape Architecture--22 Texas Administrative Code §§3.191 and 3.192 (Sections 3.191 and 3.192 of this Chapter).

(55) [~~(54)~~] TBAE--Texas Board of Architectural Examiners.

(56) [~~(55)~~] TDLR--Texas Department of Licensing and Regulation.

(57) [~~(56)~~] Texas Department of Licensing and Regulation (TDLR)--A Texas state agency responsible for the implementation and enforcement of the Texas Architectural Barriers Act.

(58) [~~(57)~~] Texas Guaranteed Student Loan Corporation (TGSLC)--A public, nonprofit corporation that administers the Federal Family Education Loan Program.

(59) [~~(58)~~] TGSLC--Texas Guaranteed Student Loan Corporation.

(60) [~~(59)~~] Vice-Chair--The member of the Board who serves as the assistant presiding officer and, in the absence of the Chair, serves as the Board's presiding officer. If necessary, the Vice-Chair succeeds the Chair until a new Chair is appointed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603506
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

SUBCHAPTER G. COMPLIANCE AND ENFORCEMENT

22 TAC §3.122

The Texas Board of Architectural Examiners proposes amendments to §3.122 of Chapter 3, Subchapter G, Title 22, which specifies requirements for a landscape architect to jointly provide services with a non-registrant. The proposed amendment would make the section applicable to associations between landscape architectural firms and non-registrants. The proposed revisions would exclude from the section's requirements subcontracting and consulting agreements entered into between landscape architects or their firms and non-registrants working for a client. The proposal repeals provisions that require the mandated written contract of association to include the termination date of the association, and information about whether the association exists for only one project. The amendment as proposed would modify a requirement relating to records retention to conform to the generally applicable records retention requirement stated elsewhere in the rules. The proposed amendment creates a provision to implement §1052.005(b), Texas Occupations Code Annotated, which allows a landscape architect licensed or registered in another jurisdiction who does not open or maintain a business in this state to perform landscape architectural services in this state in consultation with a Texas landscape architect. The proposed rule would require the Texas landscape architect to exercise responsible charge over the preparation of construction documents prepared as a result of the association with the out-of-state landscape architect. The proposed rule would require the Texas landscape architect to seal the construction documents as though they had been prepared under her or his supervision and control. All other requirements relating to associations would apply to an association between a Texas landscape architect and a landscape architect from another jurisdiction.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended section is in effect, there will be no significant fiscal implications for state or local government as a result of enforcing or administering the section. The agency estimates a one-time fiscal impact of $20,000 in upgrading the agency's database to collect the information.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the sections are in effect the public benefits expected as a result of the amendment to the rule are 1) to ensure that the services provided through collaborative efforts between a landscape architect or a landscape architectural firm and non-registrants are provided by and through landscape architects and 2) to ensure that a Texas landscape architect exercises a minimum degree of supervision over an out-of-state landscape architect who prepares construction documents for use in Texas. The proposed rule imposes requirements on a landscape architect in an individual capacity or as a principal on behalf of a landscape architecture firm. Therefore, the rule as amended has no effect upon small or micro-businesses. The amendment will impose an indeterminable cost on out-of-state licensees who must consult with a Texas registrant. However, the amendment implements a requirement currently imposed under law and therefore the cost is not directly attributable to the amendment.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to §1051.202, Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities; §1051.208, Texas occupations Code Annotated, which requires the Board to adopt by rule standards of conduct for its registrants; §1052.003, Texas Occupations Code Annotated, which prohibits a person who is not registered as a landscape architect from engaging in the practice of landscape architecture, subject to exceptions, and prohibits non-registrants from using the title "landscape architect" or the term "landscape architecture" to refer to her or his services

or work; and §1052.005, Texas Occupations Code Annotated, which specifies the circumstances under which a person who is registered or licensed as a landscape architect in another jurisdiction may offer to perform landscape architecture in Texas.

The proposed amendment to this section does not affect any other statutes.

§3.122. Association.

(a) A Landscape Architect or a Principal, on behalf of a Landscape Architecture firm, who forms a business association[~~, either formally or informally,~~] to jointly provide [~~offer~~] landscape architectural services with any Nonregistrant who is:

(1) not an employee of the Landscape Architect or Landscape Architecture firm;

(2) not a client of the Landscape Architect or Landscape Architecture firm; and

(3) not a subcontractor nor a consultant of the Landscape Architect or Landscape Architecture firm under contract with a client except as described in subsection (e) of this section [~~individual who is not a duly registered Texas Landscape Architect or bona fide employee working in the same firm where the Landscape Architect is employed or with any group of individuals who are not duly registered Texas Landscape Architects~~] shall, prior to providing [~~offering~~] such services on behalf of the business association, enter into a written agreement of association with the Nonregistrant [~~Nonregistrant(s)~~] whereby the Landscape Architect or the Landscape Architecture firm agrees to be responsible for the preparation of all Construction Documents issued by the association. [~~prepared and issued for use in Texas pursuant to the agreement of association. All Construction Documents prepared and issued for use in Texas pursuant to the agreement of association shall be prepared by the Landscape Architect or under the Landscape Architect's Supervision and Control.~~]

(b) The written agreement of association shall include the following: [~~be signed by all parties to the agreement. In addition to the provisions of subsection (a) of this section, the written agreement of association shall contain the following:~~]

(1) The date when the agreement to associate is effective;[~~and the approximate date when the association will be dissolved if such association is not to be a continuing relationship. If the association is to be a continuing relationship, that fact shall be so noted in the agreement. If the association is only for one project, the project shall be identified in the agreement of association by listing both the client's and the project's names and addresses.~~]

(2) The name, address, telephone number, registration number, and signature of the [~~each~~] Landscape Architect or Principal on behalf of a Landscape Architecture firm which [~~who~~] has agreed to associate with the Nonregistrant; [~~Nonregistrant(s).~~]

(3) The name, address, telephone number, and signature of the [~~each~~] Nonregistrant with whom the Landscape Architect or Principal has agreed to associate.

(c) The Landscape Architect or Principal shall prepare or exercise Supervision and Control over the preparation of all Construction Documents issued by the association unless the Construction Documents are prepared and issued as described in subsection (e) of this section. All Construction Documents prepared pursuant to the association described in this section shall be sealed, signed, and dated in accordance with the provisions of Subchapter F.

(d) The Landscape Architect who seals Construction Documents on behalf of the association shall retain paper or electronic copies of them, together with the written agreement of association, and make them available for review by the Board for ten (10) years after the date of the Landscape Architect's signature on the Construction Documents. [~~Paper or microform copies of all Construction Documents resulting from the association, together with the written agreement of association, shall be retained by the Landscape Architect who sealed them and made available for review by the Board for ten (10) years from the date of substantial completion of each project.~~]

(e) If, pursuant to §1052.005(b) of the Texas Occupations Code, a Texas Landscape Architect associates with a person who is not a Texas Landscape Architect but is registered as a landscape architect in another jurisdiction and does not maintain or open an office in Texas, the Texas Landscape Architect shall, at a minimum, exercise Responsible Charge over the preparation of all Construction Documents issued for use in Texas as a result of the association. The Texas Landscape Architect shall seal, sign, and date all Construction Documents issued for use in Texas as a result of the association in the same manner as if the Landscape Architect had prepared the Construction Documents or they had been prepared under the Landscape Architect's Supervision and Control. All other requirements of this section relating to associations apply to an association between a Landscape Architect and a person registered as a landscape architect in another jurisdiction regardless of whether the Texas Landscape Architect or the landscape architect from another jurisdiction acts as the "consultant" as that term is used in §1052.005(b) of the Texas Occupations Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603507
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

22 TAC §3.124

The Texas Board of Architectural Examiners proposes an amendment to §3.124 of Chapter 3, Subchapter G, Title 22, pertaining to business registration. The proposed revisions require a principal of a landscape architecture firm to annually register the firm with the Board. If a landscape architect or a landscape architectural firm enters into an agreement of association with a non-registrant under §3.122, the proposed rule would require the landscape architect or a principal on behalf of the firm to annually register the business association with the Board. If a registered firm, business entity, or business association dissolves or otherwise becomes unable to lawfully offer or provide landscape architecture, the landscape architect who last registered the business entity would be required to so notify the Board within 30 days after the dissolution or the loss of the lawful authority to offer or provide architecture. The proposal would prohibit the firm, entity, or association from thereafter offering or providing landscape architecture unless another landscape architect is identified as a principal or one who has entered into an agreement of association to provide landscape architecture. The proposed amendment requires the initial registration to occur within 30 days after the creation of the firm, entity, or association. Thereafter, the annual registration date would coincide with the annual registration date of the

landscape architect who has the duty to register the firm, entity, or association. The proposed amendment is intended to allow the Board to maintain information on the firms, businesses, and associations that may lawfully offer landscape architecture. The purpose for the proposal is to ensure that business entities which offer or provide landscape architecture do so only by and through registered landscape architects.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended section is in effect, there will be no significant fiscal implications for state government as a result of enforcing or administering the sections. Enforcing or administering the sections will have no fiscal impact on local government. The agency estimates a one-time fiscal impact of $20,000 in upgrading the agency's database to collect and maintain the information.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the sections are in effect there would be a public benefit resulting from the proposed amendment in that the agency would receive more comprehensive and up-to-date information on the firms and business entities that may lawfully offer or render landscape architecture. The agency will therefore more easily identify firms and businesses that may not offer or render landscape architecture and take action to prevent them from misleading the public. Since the proposed rule shifts the responsibility for registering firms, business entities, and associations from the businesses to individuals, the proposal will have no adverse impact upon small businesses or micro-businesses. There will be no cost to individuals required to comply with the rule.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to §1051.202, Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities; §1051.306, Texas Occupations Code Annotated, which allows the Board to adopt rules requiring business entities that engage in the practice of landscape architecture to register with the Board; §1051.208, Texas Occupations Code Annotated, which requires the Board to adopt by rule standards of conduct for its registrants; and §1052.003 and §1052.151, Texas Occupations Code Annotated, which restricts the practice of landscape architecture and the use of the title "landscape architect" and the term "landscape architecture" to registered landscape architects.

The proposed amendment to this section does not affect any other statutes.

§3.124. Business Registration.

(a) A Principal for a Landscape Architecture firm or other [~~Unless excepted from the Act in accordance with the specific exemptions described in the Act, each~~] business entity [~~or association~~] that offers or provides landscape architectural services in Texas must annually register information regarding the firm or business entity with the Board [~~by submitting a completed business registration form accompanied by at least one duly executed Landscape Architect of Record affidavit. Blank business registration forms and Landscape Architect of Record affidavit forms may be requested by contacting the Board's office~~].

(b) A Landscape Architect or a Principal of a Landscape Architecture firm who enters into an agreement to create a business association pursuant to §3.122 of this title shall annually register the association with the Board. [~~Once the Board has received a completed business registration form and a duly executed Landscape Architect of Record affidavit from a business entity or association, the Board shall enter the entity's or association's name into its registry of business entities and associations that are authorized to offer and provide landscape architectural services in Texas.~~]

(c) If a business entity or association dissolves or otherwise becomes unable to lawfully offer or provide Landscape Architecture services in Texas, the Landscape Architect or Principal who last registered the business entity or association shall [~~has signed a Landscape Architect of Record affidavit ceases to provide landscape architectural services on behalf of the business entity or association for which the Landscape Architect signed the affidavit, the Landscape Architect must~~] so notify the Board in writing. Such notification must be postmarked or otherwise provided within thirty (30) days of the date of dissolution or the date the business entity or association became unable to lawfully offer or provide Landscape Architecture services. A business entity or association may not continue to offer or provide Landscape Architecture services unless another Landscape Architect or Principal files information with the Board identifying himself or herself as the Principal for the business entity or association within that thirty (30) day period. [~~the Landscape Architect ceases to provide landscape architectural services on behalf of the business entity or association.~~]

[~~(d) Effective September 1, 2001, the Board may establish a business registration fee. All business entities required to register with the Board pursuant to the provisions of this section shall pay the business registration fee as prescribed by the Board.~~]

(d) [~~(e)~~] A Landscape Architect who is a sole proprietor doing business under his/her own name shall be exempt from the requirements of subsections (a) - (c) [~~(d)~~] of this section.

(e) A Landscape Architect or Principal who is subject to this section shall initially register a business entity or a business association within thirty (30) days after the creation of the business entity or the business association. Thereafter, the annual registration renewal of the business entity or business association shall coincide with the Landscape Architect's or Principal's renewal of registration as a Landscape Architect.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603508
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

SUBCHAPTER H. PROFESSIONAL CONDUCT

22 TAC §3.144

The Texas Board of Architectural Examiners proposes amendments to §3.144 of Chapter 3, Subchapter H, Title 22, pertaining to dishonest practice. The proposed rule repeals a requirement that mandates certain advertisements of a landscape architect's or a landscape architecture firm's services display the registration number of the landscape architect or any landscape architect employed by or associated with the firm. The requirement applies only to advertising that appears in a telephone directory,

email directory, web site, or newspaper. There does not appear to be any great benefit to the public health, safety, and welfare to impose these requirements on these types of advertisements.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended section is in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the sections are in effect the public benefit expected as a result of the amendment to the rule is the elimination of a requirement that appears to have little public purpose and is often overlooked by registrants. There will be no impact on small or micro businesses. There will be no cost to individuals required to comply with the rule.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to §1051.202, Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities and §1051.208, Texas Occupations Code Annotated, which requires the Board to adopt by rule standards of conduct for its registrants.

The proposed amendment to this section does not affect any other statutes.

§3.144. Dishonest Practice.

(a) A Landscape Architect may not directly or indirectly perform an act, omit an act or allow an omission, make an assertion, or otherwise engage in a practice with the intent to:

(1) defraud,

(2) deceive, or

(3) create a misleading impression.

(b) A Landscape Architect may not advertise in a manner which is false, misleading, or deceptive. [~~Each advertisement that offers the service of a Landscape Architect in Texas and is found in a telephone directory, e-mail directory, web site, or newspaper must clearly display that Landscape Architect's Texas landscape architectural registration number. If an advertisement is for a business that employs more than one Landscape Architect, only the Texas landscape architectural registration number for one Landscape Architect employed by the firm or associated with the firm pursuant to section 3.122 is required to be displayed.~~]

(c) A Landscape Architect may not directly or indirectly solicit, offer, give, or receive anything or any service of significant value as an inducement or reward to secure any specific publicly funded landscape architectural work.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603509

Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

22 TAC §3.152

The Texas Board of Architectural Examiners proposes new rule §3.152 in Chapter 3, Subchapter H, Title 22, pertaining to professional conduct. The proposed rule prohibits the Board's registrants from injuring or attempting to injure the professional reputation of other people. The proposal allows a registrant to disclose dishonesty, recklessness, incompetence, or illegal conduct to the proper authorities. The proposed rule also allows a registrant to provide a discrete opinion of the services or work of another person upon the request of a client or prospective employer. The purpose of the rule is to discourage the Board's licensees from engaging in unprofessional conduct in the course of practicing the professions the Board regulates.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new section is in effect, there will be no significant fiscal implications for state government as a result of enforcing or administering the section. There will be no fiscal impact on local government as a result of enforcing or administering the section.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the section is in effect the public benefit expected as a result of the new rule would be to encourage productive and professional conduct in the design and construction of projects by design professionals regulated by the Board. There will be no impact on small or micro-businesses. There will be no cost to individuals required to comply with the rule.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The new rule is proposed pursuant to §1051.202, Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities and §1051.208, Texas Occupations Code Annotated, which requires the Board to adopt by rule standards of conduct for its registrants.

The proposed new rule does not affect any other statutes.

§3.152. Malicious Injury to Professional Reputation.

A Landscape Architect may not maliciously injure or attempt to injure the professional reputation of another. However, a Landscape Architect may disclose a dishonest practice, recklessness, incompetence, or illegal conduct to the proper authorities or provide a frank but private appraisal of the services or work of a person or a business entity upon request by a client or a prospective employer.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603510

Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

SUBCHAPTER K. HEARINGS--CONTESTED CASES

22 TAC §3.232

The Texas Board of Architectural Examiners proposes an amendment to §3.232 of Chapter 3, Subchapter K, Title 22, pertaining to hearings and contested cases. The proposed amendment changes cross-references to §3.122 and §3.124 and modifies the descriptions of the violations of those sections within the penalty matrix in §3.232. The penalty matrix is further amended to include a penalty of suspension or revocation of registration for a landscape architect's violation of §3.122(e) by failing to exercise responsible charge over the preparation of a construction document by an association with an out-of-state landscape architect. The proposal also amends the penalty matrix by specifying an administrative penalty or reprimand as the sanction for a landscape architect's failure to timely register a business entity or association as principal thereof in violation of §3.124(a), (b), and (e). The amendments conform the penalty matrix to proposed revisions to §3.122 and §3.124. The proposed amendment also corrects a cross-reference to the incorrect number of a rule regarding the removal of landscape architectural seals from construction documents.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections. The proposed amendment specifies recommended sanctions for violations of substantive requirements in other sections. The proposed amendments are therefore not anticipated to either increase or decrease the agency's work load.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the sections are in effect the public benefits expected as a result of the proposed amendments to the rule are to provide public notice of the possible sanction for failing to comply with the business association and registration rules. If the penalty matrix in §3.232 were not amended and the amendments to §3.122 and §3.124 were adopted, the penalty matrix would be inaccurate. The amendment is not anticipated to have any impact upon small or micro-business. The penalty matrix does not impose affirmative duties or prohibitions but specifies a range of sanctions for violating other rules. Therefore, there is no cost to individuals subject to the penalty matrix resulting from the amendment.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to §1051.202 and §1051.452(c), Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities and requires the Board to adopt an administrative penalty schedule for violations of the laws enforced by the Board, respectively.

The proposed amendment to this section does not affect any other statutes.

§3.232. Board Responsibilities.

(a) - (i) (No change.)

(j) The Board and the administrative law judge who presides over the formal hearing in a Contested Case shall refer to the following guidelines to determine the appropriate penalty for a violation of any of the statutory provisions or rules enforced by the Board:
Figure: 22 TAC §3.232(j)

(k) - (m) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603511
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

CHAPTER 5. INTERIOR DESIGNERS
SUBCHAPTER A. SCOPE; DEFINITIONS

22 TAC §5.5

The Texas Board of Architectural Examiners proposes an amendment to §5.5 of Chapter 5, Subchapter A, pertaining to defined terms. The proposed amendment defines the term "principal" as an interior designer who is responsible, either alone or with other interior designers, for an organization's practice of interior design. The definition specifies who is responsible as principal, among the interior designers within a business organization, for registering the organization with the Board as either a business association or other business entity that offers or provides interior design services.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for the first five-year period the amended section is in effect the public benefit expected as a result of the amendment to the rule is to clarify the class of interior designers who, as "principal" on behalf of a business association or other business entity, must annually register the association or entity with the Board. Without the definition of the term "principal," the business association and registration requirements would be ambiguous. The proposed amendment would have no impact on small or micro-businesses. There will be no cost to individuals required to comply with the amended rule.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §1051.202, Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities; §1051.208, Texas Occupations Code Annotated, which requires the Board to establish by rule standards of conduct for its registrants; and §1051.306, Texas Occupations Code Annotated, which allows the Board to adopt rules requiring business entities that engage in the practice of interior design to register with the Board.

The proposed amendment to this section does not affect any other statutes.

§5.5. Terms Defined Herein.

The following words, terms, and acronyms, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (35) (No change.)

(36) Principal--An Interior Designer who is responsible, either alone or with other Interior Designers, for an organization's practice of Interior Design.

(37) [~~(36)~~] Registrant--Interior Designer.

(38) [~~(37)~~] Regulatory Approval--The approval of Construction Documents by a Governmental Entity after a review of the Interior Design content of the Construction Documents as a prerequisite to construction or occupation of a building or facility.

(39) [~~(38)~~] Reinstatement--The procedure through which a cancelled, Surrendered, or revoked Texas interior design registration certificate is restored.

(40) [~~(39)~~] Renewal--The procedure through which an Interior Designer pays a periodic fee so that the Interior Designer's registration certificate will continue to be effective.

(41) [~~(40)~~] Responsible Charge--That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered interior designers applying the applicable interior design standard of care.

(42) [~~(41)~~] Rules and Regulations of the Board--22 Texas Administrative Code §§5.1 et seq.

(43) [~~(42)~~] Rules of Procedure of SOAH--1 Texas Administrative Code §§155.1 et seq.

(44) [~~(43)~~] Secretary-Treasurer--The member of the Board responsible for signing the official copy of the minutes from each Board meeting and maintaining the record of Board members' attendance at Board meetings.

(45) [~~(44)~~] SOAH--State Office of Administrative Hearings.

(46) [~~(45)~~] State Office of Administrative Hearings (SOAH)--A Governmental Entity created to serve as an independent forum for the conduct of adjudicative hearings involving the executive branch of Texas government.

(47) [~~(46)~~] Supervision and Control--The amount of oversight by an interior designer overseeing the work of another whereby

(A) the interior designer and the individual performing the work can document frequent and detailed communication with one another and the interior designer has both control over and detailed professional knowledge of the work; or

(B) the interior designer is in Responsible Charge of the work and the individual performing the work is employed by the interior designer or by the interior designer's employer.

(48) [~~(47)~~] Supplemental Document--A document that modifies or adds to the technical interior design content of an existing Construction Document.

(49) [~~(48)~~] Surrender--The act of relinquishing a Texas interior design registration certificate along with all privileges associated with the certificate.

(50) [~~(49)~~] Table of Equivalents for Education and Experience in Interior Design--22 Texas Administrative Code §§5.201 et seq. (Sections 5.201 - 5.203 of this Chapter).

(51) [~~(50)~~] TBAE--Texas Board of Architectural Examiners.

(52) [~~(51)~~] TDLR--Texas Department of Licensing and Regulation.

(53) [~~(52)~~] Texas Department of Licensing and Regulation (TDLR)--A Texas state agency responsible for the implementation and enforcement of the Texas Architectural Barriers Act.

(54) [~~(53)~~] Texas Guaranteed Student Loan Corporation (TGSLC)--A public, nonprofit corporation that administers the Federal Family Education Loan Program.

(55) [~~(54)~~] TGSLC--Texas Guaranteed Student Loan Corporation.

(56) [~~(55)~~] Vice-Chair--The member of the Board who serves as the assistant presiding officer and, in the absence of the Chair, serves as the Board's presiding officer. If necessary, the Vice-Chair succeeds the Chair until a new Chair is appointed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603512
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

SUBCHAPTER G. COMPLIANCE AND ENFORCEMENT

22 TAC §5.132

The Texas Board of Architectural Examiners proposes an amendment to §5.132 of Chapter 5, Subchapter G, which specifies requirements for an interior designer to form an association to jointly provide services with a non-registrant. The proposed amendment would make the section applicable to associations between interior design firms and non-registrants. The proposed revisions would exclude from the section's requirements subcontracting and consulting agreements entered into between interior designers or their firms and non-registrants working for a client. The proposal deletes provisions that require the mandated written contract of association to include the termination date of the association, and information about whether

the association exists for only one project. The amendment as proposed would modify a requirement relating to records retention to conform to the generally applicable records retention requirement stated elsewhere in the rules. The proposed amendment creates a provision to implement §1053.002(b), Texas Occupations Code Annotated, which allows an interior designer licensed or registered in another jurisdiction who does not open or maintain a business in this state to perform interior design services in this state in consultation with a Texas interior designer. The proposed amendment would require the Texas interior designer to exercise responsible charge over the preparation of construction documents prepared as a result of the association with the out-of-state interior designer. The proposal would require the Texas interior designer to seal the construction documents as though they had been prepared under her or his supervision and control. All other requirements relating to associations would apply to an association between a Texas interior designer and an interior designer from another jurisdiction.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended section is in effect, there will be no significant fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for the first five-year period the amended section is in effect the public benefits expected as a result of the amendment are: 1) to ensure that the services provided through collaborative efforts between an interior designer or an interior design firm and a non-registrant are provided by and through interior designers and 2) to ensure that a Texas interior designer exercises a minimum degree of supervision over an out-of-state interior designer who prepares construction documents for use in Texas. The proposal imposes requirements on an interior designer in an individual capacity or as a principal on behalf of an interior design firm. Therefore, the rule as amended has no effect upon small or micro-businesses. The amendment will impose an indeterminable cost on out-of-state licensees who must consult with a Texas registrant. However, the amendment implements a requirement currently imposed under law and therefore the cost is not directly attributable to the amendment.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §1051.202, Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities; §1051.208, Texas Occupations Code Annotated, which requires the Board to adopt by rule standards of conduct for its registrants; §1053.151, Texas Occupations Code Annotated, which prohibits a person who is not registered as an interior designer from using the title "interior designer" and from using the term "interior design" to represent any service the person offers or performs.

The proposed amendment to this section does not affect any other statutes.

§5.132. Association.

(a) An Interior Designer or a Principal on behalf of an Interior Design firm who forms a business association[~~, either formally or informally,~~] to jointly provide [~~offer~~] services designated as "interior design" with any Nonregistrant who is: [~~person who is not a duly registered Texas Interior Designer or~~]

(1) not an employee of the Interior Designer or the Interior Design firm;

(2) not a client of the Interior Designer or the Interior Design firm; and

(3) not a subcontractor nor a consultant of the Interior Designer or Interior Design firm under contract with a client except as described in subsection (e) of this section; [~~bona fide employee working in the same firm where the Interior Designer is employed or with any group of individuals who are not duly registered Texas Interior Designers~~] shall, prior to providing [~~offering~~] such services on behalf of the business association, enter into a written agreement of association with the Nonregistrant [~~nonregistrant~~] whereby the Interior Designer or the Interior Design firm agrees to be responsible for the preparation of all Construction Documents [~~prepared and~~] issued by the association. [~~for use in Texas pursuant to the agreement of association. All Construction Documents prepared and issued for use in Texas pursuant to the agreement of association shall be prepared by the Interior Designer or under the Interior Designer's supervision and control.~~]

(b) The [~~written agreement of association shall be signed by all parties to the agreement. In addition to the provisions of subsection (a) of this section, the~~] written agreement of association shall include [~~contain~~] the following:

(1) The date when the agreement to associate is effective; [~~and the approximate date when the association will be dissolved if such association is not to be a continuing relationship. If the association is to be a continuing relationship, that fact shall be so noted in the agreement. If the association is only for one project, the project shall be identified in the agreement of association by listing both the client's and the project's names and addresses.~~]

(2) The name, address, telephone number, registration number, and signature of the [~~each~~] Interior Designer or the Principal on behalf of the Interior Design firm which [~~who~~] has agreed to associate with the Nonregistrant; [~~nonregistrant(s).~~]

(3) The name, address, telephone number, and signature of the Nonregistrant [~~each nonregistrant~~] with whom the Interior Designer or Principal has agreed to associate.

(c) The Interior Designer shall prepare or exercise Supervision and Control over the preparation of all Construction Documents issued by the association unless the Construction Documents are prepared and issued as described in subsection (e) of this section. All Construction Documents prepared pursuant to the association described in this section shall be sealed, signed, and dated in accordance with the provisions of Subchapter F.

(d) The Interior Designer who seals Construction Documents on behalf of the association shall retain paper or electronic copies of them together with the written agreement of association and make them [~~Paper or microform copies of all Construction Documents resulting from the association, together with the written agreement of association, shall be retained by the Interior Designer who sealed them and made~~] available for review by the Board for ten (10) years after [~~from~~] the date of the Interior Designer's signature on the Construction Documents. [~~substantial completion of each project.~~]

(e) If, pursuant to §1053.002(b) of the Texas Occupations Code, a Texas Interior Designer associates with a person who is not a Texas Interior Designer but is registered as an interior designer in another jurisdiction and does not maintain or open an office in Texas, the Texas Interior Designer shall, at a minimum, exercise Responsible

Charge over the preparation of all Construction Documents issued for use in Texas as a result of the association. The Texas Interior Designer shall seal, sign, and date all Construction Documents issued for use in Texas as a result of the association in the same manner as if the Interior Designer had prepared the Construction Documents or they had been prepared under the Interior Designer's Supervision and Control. All other requirements of this section relating to associations apply to an association between an Interior Designer and a person registered as an interior designer in another jurisdiction regardless of whether the Texas Interior Designer or the interior designer from another jurisdiction acts as the "consultant" as that term is used in §1053.002(b) of the Texas Occupations Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603513
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

22 TAC §5.134

The Texas Board of Architectural Examiners proposes an amendment to §5.134 of Chapter 5, Subchapter G, pertaining to business registration. The proposed revisions require a principal of an interior design firm to annually register the firm with the Board. If an interior designer or an interior design firm enters into an agreement of association with a non-registrant under §5.132, the interior designer or a principal on behalf of the firm would annually register the business association with the Board. If a registered firm, business entity, or business association dissolves or otherwise becomes unable to lawfully use the title "interior designer" or the term "interior design" to refer to itself or its services, the interior designer who last registered the business entity would be required to so notify the Board within 30 days after the dissolution or the loss of the lawful authority to use the title or term. The proposal would prohibit the firm, entity, or association from thereafter using the title "interior designer" or the term "interior design" unless another interior designer is identified as a principal or one who has entered into an agreement of association with the entity or association. The proposal would require the initial registration to occur within 30 days after the creation of the firm, entity, or association. Thereafter, the annual registration date would coincide with the annual registration date of the interior designer who has the duty to register the firm, entity, or association. The proposed amendment is intended to allow the Board to maintain information on the firms, businesses, and associations that may lawfully operate as an "interior design" business entity. The purpose for the proposal is to ensure that each business entity that refers to itself as an "interior designer" or refers to its services as "interior design" is able to offer and provide the services of a registered interior designer.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended section is in effect, there will be no significant fiscal implications for state government as a result of enforcing or administering the section. Enforcing or administering the section will have no fiscal impact on local government. The agency estimates a one-time fiscal impact of $20,000 in upgrading the agency's database to collect and maintain the information.

Ms. Hendricks has also determined that for the first five-year period the amended section is in effect the public would benefit in that the proposed amendment would provide the agency with more comprehensive and up-to-date information on the firms and business entities that may lawfully represent themselves as "interior design" firms. The agency will therefore more easily identify firms and businesses that may not use the title "interior designer" or offer or render "interior design" and take action to prevent them from misleading the public. Since the proposed amendment shifts the responsibility for registering firms, business entities, and associations from the businesses to individuals, the proposal will have no adverse impact upon small businesses or micro-businesses. There will be no cost to individuals required to comply with the amended rule.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §1051.202, Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities; §1051.306, Texas Occupations Code Annotated, which allows the Board to adopt rules requiring business entities that engage in the practice of interior design to register with the Board; §1051.208, Texas Occupations Code Annotated, which requires the Board to adopt by rule standards of conduct for its registrants; and §1053.151, Texas Occupations Code Annotated, which prohibits any person other than an interior designer from using the title "interior designer" to represent herself or himself or the term "interior design" to represent a service the person offers or performs.

The proposed amendment to this section does not affect any other statutes.

§5.134. Business Registration.

(a) A Principal for an Interior Design firm or other [~~Each~~] business entity [~~or association~~] that uses the title "interior designer" or the term "interior design" to describe itself or a service it offers or performs in Texas must annually register information regarding the firm or business entity with the Board. [~~with the Board by submitting a completed business registration form accompanied by at least one duly executed Interior Designer of Record affidavit. Blank business registration forms and Interior Designer of Record affidavit forms may be requested by contacting the Board's office.~~]

(b) An Interior Designer or a Principal of an Interior Design firm who enters into an agreement to create a business association pursuant to §5.132 of this title shall annually register the association with the Board. [~~Once the Board has received a completed business registration form and a duly executed Interior Designer of Record affidavit from a business entity or association, the Board shall enter the entity's or association's name into its registry of business entities and associations that are authorized to use the title "interior designer" and the term "interior design" to describe themselves and services they offer and perform in Texas.~~]

(c) If a business entity or association dissolves or otherwise becomes unable to lawfully use the title "interior designer" or the term "interior design" to describe itself or its services, the Interior Designer or Principal who last registered the business entity or association shall so [~~If an Interior Designer who has signed an Interior Designer of Record~~

affidavit ceases to provide interior design services on behalf of the business entity or association for which the Interior Designer signed the affidavit, the Interior Designer must] notify the Board in writing. Such notification must be postmarked or otherwise provided within thirty (30) days of the date of dissolution or the date the business entity or association became unable to lawfully use the title "interior designer" and the term "interior design". A business entity or association may not continue to use the title "interior designer" or the term "interior design" unless another Interior Designer or Principal files information with the Board identifying himself or herself as the Principal for the business entity or association within that thirty (30) day period. [the Interior Designer ceases to provide interior design services on behalf of the business entity or association.]

[(d) Effective September 1, 2001, the Board may establish a business registration fee. All business entities required to register with the Board pursuant to the provisions of this section shall pay the business registration fee as prescribed by the Board.]

(d) [(e)] An Interior Designer who is a sole proprietor doing business under his/her own name shall be exempt from the requirements of subsections (a) - (c) [(d)] of this section.

(e) An Interior Designer or Principal who is subject to this section shall initially register a business entity or a business association within thirty (30) days after creation of the business entity or the business association. Thereafter the annual registration renewal of the business entity or business association shall coincide with the Interior Designer's or Principal's renewal of registration as an Interior Designer.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603514
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

SUBCHAPTER H. PROFESSIONAL CONDUCT

22 TAC §5.154

The Texas Board of Architectural Examiners proposes an amendment to §5.154 of Chapter 5, Subchapter H, pertaining to dishonest practice. The proposed amendment deletes a requirement that mandates certain advertisements of an interior designer's or an interior design firm's services display the registration number of the interior designer or any interior designer employed by or associated with the firm. The requirement applies only to advertising that appears in a telephone directory, e-mail directory, web site, or newspaper. There does not appear to be any great benefit to the public health, safety, and welfare to impose these requirements on these types of advertisements.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended section is in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for the first five-year period the amended section is in effect the public benefit expected as a result of the amendment to the rule is the elimination of a requirement that appears to have little public purpose and is often overlooked by registrants. There will be no impact on small or micro businesses. There will be no cost to individuals required to comply with the amended rule.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §1051.202, Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities and §1051.208, Texas Occupations Code Annotated, which requires the Board to adopt by rule standards of conduct for its registrants.

The proposed amendment to this section does not affect any other statutes.

§5.154. Dishonest Practice.

(a) (No change.)

(b) An Interior Designer may not advertise in a manner which is false, misleading, or deceptive. [Each advertisement that offers the services of an Interior Designer in Texas and is found in a telephone directory, e-mail directory, web site, or newspaper must clearly display that Interior Designer's Texas interior design registration number. If an advertisement is for a business that employs more than one Interior Designer, only the Texas interior design registration number for one Interior Designer employed by the firm or associated with the firm pursuant to section 5.132 is required to be displayed.]

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603515
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

22 TAC §5.161

The Texas Board of Architectural Examiners proposes new §5.161 in Chapter 5, Subchapter H, pertaining to professional conduct. The proposed rule prohibits the Board's registrants from injuring or attempting to injure the professional reputation of other people. The proposal allows a registrant to disclose dishonesty, recklessness, incompetence, or illegal conduct to the proper authorities. The proposed rule also allows a registrant to provide a discrete opinion of the services or work of another person upon the request of a client or prospective employer. The purpose of the rule is to discourage the Board's licensees from engaging in unprofessional conduct in the course of practicing the professions the Board regulates.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new rule is in effect, there will be no significant fiscal implications for state government as a result of enforcing or administering the section. There will be no fiscal impact on local

government resulting from the enforcement or administration of the section.

Ms. Hendricks has also determined that for the first five-year period the section is in effect the public benefit expected as a result of the new rule would be to encourage productive and professional conduct in the design and construction of projects by design professionals regulated by the Board. There will be no impact on small or micro-businesses. There will be no cost to individuals required to comply with the rule.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The new rule is proposed pursuant to §1051.202, Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities and §1051.208, Texas Occupations Code Annotated, which requires the Board to adopt by rule standards of conduct for its registrants.

The proposed new rule does not affect any other statutes.

§5.161. Malicious Injury to Professional Reputation.

An Interior Designer may not maliciously injure or attempt to injure the professional reputation of another. However, an Interior Designer may disclose a dishonest practice, recklessness, incompetence, or illegal conduct to the proper authorities or provide a frank but private appraisal of the services or work of a person or a business entity upon request by a client or a prospective employer.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603516
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

SUBCHAPTER K. HEARINGS--CONTESTED CASES

22 TAC §5.242

The Texas Board of Architectural Examiners proposes an amendment to §5.242 of Chapter 5, Subchapter K, pertaining to hearings and contested cases. The proposed amendment changes cross-references to §5.132 and §5.134 and modifies the descriptions of the violations of those sections within the penalty matrix in §5.242. The penalty matrix is further amended to include a penalty of suspension or revocation of registration for an interior designer's violation of §5.132(e) by failing to exercise responsible charge over the preparation of a construction document by an association with an out-of-state interior designer. The proposal also amends the penalty matrix by specifying an administrative penalty or reprimand as the sanction for an interior designer's failure to timely register a business entity or association as principal thereof in violation of §5.134(a), (b), and (e). The changes conform the penalty matrix to proposed revisions to §5.132 and §5.134. The proposed amendment also corrects a cross-reference to the incorrect number of a rule regarding the removal of interior design seals from construction documents.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section. The proposed amendment specifies recommended sanctions for violations of substantive requirements in other sections. The proposed amendments are therefore not anticipated to either increase or decrease the agency's work load.

Ms. Hendricks has also determined that for the first five-year period the amended section is in effect the public benefits expected as a result of the amendment to the rule are to provide public notice of the possible sanction for failing to comply with the business association and registration rules. If the penalty matrix in §5.242 were not amended and the amendments to §5.132 and §5.134 were adopted, the penalty matrix would be inaccurate. The amendment is not anticipated to have any impact upon small or micro-business. The penalty matrix does not affirmative duties or prohibitions but specifies a range of sanctions for violating other rules. Therefore, there is no cost to individuals subject to the penalty matrix resulting from the amendments.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §1051.202 and §1051.452(c), Texas Occupations Code Annotated, which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities and requires the Board to adopt an administrative penalty schedule for violations of the laws enforced by the Board, respectively.

The proposed amendment to this section does not affect any other statutes.

§5.242. Board Responsibilities.

(a) - (i) (No change.)

(j) The Board and the administrative law judge who presides over the formal hearing in a Contested Case shall refer to the following guidelines to determine the appropriate penalty for a violation of any of the statutory provisions or rules enforced by the Board:
Figure: 22 TAC §5.242(j)

(k) - (m) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603517
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 305-8544

♦ ♦ ♦

PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER F. RECORDS KEEPING

22 TAC §573.52

The Texas Board of Veterinary Medical Examiners ("Board") proposes an amendment to §573.52 concerning Patient Record Keeping. The section sets out the Board's minimum requirements for patient record keeping by veterinarians. The main purpose of the amendments is to require that the patient record include, where appropriate, an entry noting any diagnostics, treatments, or referrals offered by the veterinarian and declined by the owner of the animal. The Board notes that a significant number of complaints against veterinarians involve the treatment options offered the owner by the veterinarian. Often a dispute will involve whether the offer was made and if the owner acted upon it. This is an important point because often the treatment options offered the client owner significantly affect the crucial issue of the standard of veterinary care. If the owner declines certain diagnostics and treatments, a notation in the record to that effect can assist the Board in resolving complaints involving the standard of care.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Allen has also determined that for the first five years the new section is in effect the public benefit anticipated as a result of enforcing the section will be to resolve complaints against veterinarians more fairly and quickly. There will be no effect on small or micro businesses. There will be no economic cost to persons required to comply with the section as proposed.

Comments on the proposed section may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, e-mail vet.board@tbvme.state.tx.us and will be accepted for 30 days following publication in the *Texas Register*.

The section is proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter. The amendments affect the Veterinary Licensing Act, Occupations Code, Subchapter H, Practice by Veterinarian.

§573.52. Patient Record Keeping.

(a) Individual records shall [~~will~~] be maintained at the veterinarian's place of business and include, but are not limited to:

(1) name and address of client;

(2) patient identity;

(3) patient history;

(4) dates of visits;

(5) any immunization records;

(6) weight if required for diagnosis or treatment. Weight may be estimated if actual weight is difficult to obtain;

(7) temperature if required for diagnosis or treatment except when treating a herd, flock or a species where taking temperature may be difficult [~~that~~ ~~is difficult to temperature~~];

(8) any laboratory analysis;

(9) any radiographs or other diagnostic imaging;

(10) names, dosages, concentration, and routes of administration of any drug prescribed, administered and/or dispensed;

(11) other details necessary to substantiate the examination, diagnosis, and treatment provided, and/or surgical procedure performed;[.]

(12) any signed acknowledgment required by §§573.12, 573.14, 573.15, and 573.16 of this Title. Each entry in the patient record shall identify the veterinarian who performed or supervised the procedure recorded; and[.]

(13) where appropriate, an entry noting any diagnostics, treatments, or referrals offered by the veterinarian and declined by the client.

(b) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 27, 2006.

TRD-200603452
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Proposed date of adoption: October 13, 2006
For further information, please call: (512) 305-7555

♦ ♦ ♦

SUBCHAPTER G. OTHER PROVISIONS

22 TAC §573.71

The Texas Board of Veterinary Medical Examiners ("Board") proposes an amendment to §573.71, concerning Employment by Nonprofit or Municipal Corporations. The Veterinary Licensing Act states that a corporation may not engage in veterinary medicine unless each shareholder of the corporation holds a license to practice. However, the Attorney General has ruled (LO 95-003) that this prohibition does not apply to nonprofit and municipal corporations. Thus, a nonprofit or municipal corporation may employ a licensee to provide veterinary services, and many cities and local governments avail themselves of this opportunity. The amendment to the section eliminates the reference to the old uncodified law and restates the right of nonprofit and municipal corporations to hire veterinarians. The amendment also provides that a licensee employed by a nonprofit or municipal corporation must fully abide by the provisions of the Veterinary Licensing Act.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Allen has also determined that for the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the section will be to resolve any questions of the public concerning the ability of nonprofit and municipal corporations to

provide veterinary services. There will be no effect on small or micro businesses. There will be no economic cost to persons required to comply with the section as proposed.

Comments on the proposed amendment may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, e-mail vet.board@tbvme.state.tx.us and will be accepted for 30 days following publication in the *Texas Register*.

The amendment is proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter.

The amendment affects the Veterinary Licensing Act, Occupations Code, §801.506 concerning Prohibited Practices Relating to Certain Entities.

§573.71. Employment by Nonprofit or Municipal Corporations.

[~~Pursuant to the Act, §22(a), a licensee may be employed by a nonprofit or municipal corporation rendering veterinary services in connection with the sheltering and spaying or neutering or other medical care and treatment of animals. However, such employment does not exempt the licensee from any of the provisions of the Act or the rules.~~]

(a) A nonprofit or municipal corporation may employ or contract with a licensee to provide veterinary services in connection with sheltering, sterilization, vaccination, or other medical care and treatment of animals.

(b) Employment by or contractual service to a nonprofit or municipal corporation does not exempt the licensee from any of the provisions of the Veterinary Licensing Act or the Board's rules.

(c) Licensees employed by, or contracted to, nonprofit or municipal corporations shall be liable for any violations of the Act or rules occurring as a result of the practice of veterinary medicine or any veterinary services provided by the nonprofit or municipal corporation, including those occurring due to the acts or omissions of non-licensed employees of, or volunteers for, the nonprofit or municipal corporation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 27, 2006.

TRD-200603459
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Proposed date of adoption: October 13, 2006
For further information, please call: (512) 305-7555

♦ ♦ ♦

22 TAC §573.72

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Board of Veterinary Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Board of Veterinary Medical Examiners ("Board") proposes the repeal of §573.72, concerning Animal Reproduction. This section is proposed for repeal because veterinary surgery and reproduction are already defined as the practice of veterinary medicine in the Veterinary Licensing Act, and unauthorized possession and administration of prescription drugs is a violation of state and federal law. Retention of this section would be redundant and unnecessary.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period this repeal is in effect there will be no fiscal implications for state or local government.

Mr. Allen has also determined that for the first five years the repeal is in effect the public benefit will be to eliminate unnecessary rules and redundant language and simplify the public's ability to find pertinent information. There will be no effect on small or micro businesses. There will be no economic cost to persons affected by the repeal.

Comments on the proposed repeal may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, e-mail vet.board@tbvme.state.tx.us and will be accepted for 30 days following publication in the *Texas Register*.

The repeal is proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151(a) which states that the Board may adopt rules necessary to administer the chapter.

The repeal affects the Veterinary Licensing Act, Texas Occupations Code, §801.002 relating to the definition of the practice of veterinary medicine.

§573.72. Animal Reproduction.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 27, 2006.

TRD-200603458
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Proposed date of adoption: October 13, 2006
For further information, please call: (512) 305-7555

♦ ♦ ♦

CHAPTER 577. GENERAL ADMINISTRATIVE DUTIES

SUBCHAPTER B. STAFF AND MISCELLANEOUS

22 TAC §577.15

The Texas Board of Veterinary Medical Examiners ("Board") proposes amendments to §577.15, concerning Fee Schedule. The amendments increase by $5.00 the Board's required fees for current license renewals, inactive renewals, and special licenses. Proportional increases are also made in delinquent renewal fees. These fee increases are required to cover the costs of the Board's legislative appropriation for FY 2007. No changes are made in fees for the State Board Examination and Special License Examination.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the amended section is in effect there will be fiscal implications for state or local government as a result

of enforcing or administering the section. The fee increases will result in a gain to the state's general revenue of $34,235 in FY 2007; $34,235 in FY 2008; $34,235 in FY 2009; $34,235 in FY 2010; and $34,235 in FY 2011.

Mr. Allen has also determined that for the first five years the amended section is in effect the public benefit anticipated as a result of enforcing the section will be to accurately match the revenues of the agency with expenditures so as not to charge excessive fees for license renewals. There will be no effect on small or micro businesses. There will be an economic cost to persons required to comply with the section as proposed, in the form of increased licensing fees.

Comments on the proposed amendments may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, e-mail vet.board@tbvme.state.us and will be received for 30 days following publication in the *Texas Register*.

The amendments are proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151(a) which states that the Board may adopt rules necessary to administer the chapter.

The amendments affect the Veterinary Licensing Act, Texas Occupations Code, §801.303 which pertains to renewal license fees.

§577.15. Fee Schedule.

The following fees are adopted by the Board:
Figure: 22 TAC §577.15

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 27, 2006.

TRD-200603457
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Proposed date of adoption: October 13, 2006
For further information, please call: (512) 305-7555

♦ ♦ ♦

PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING

CHAPTER 661. GENERAL RULES OF PROCEDURES AND PRACTICES
SUBCHAPTER D. APPLICATIONS, EXAMINATIONS, AND LICENSING

22 TAC §661.46

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §661.46, concerning Seal and Stamps. This section identifies what the registered land surveyor is required to have in order to sign and seal his work.

The amendment will further clarify the procedures that a land surveyor must follow in the use of electronic signature and seal.

Sandy Smith, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering the amended section.

Ms. Smith has also determined that for each year of the first five years the amendment is in effect the public will benefit from the amended rule because it will clarify the use of electronic signature and seal.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the amendment as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposed change to the section has been published in the *Texas Register*.

The amendment is proposed pursuant to Title 6, Subtitle C, §1071.151, Occupations Code, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§661.46. Seal and Stamps.

At the time the applicant receives a certificate of registration/licensure, the applicant will also be instructed to secure an impression seal of the type specified by the board. As soon as the registrant has secured an impression seal, the registrant shall make an imprint thereof and shall forward said imprint to the board for its files. A rubber stamp is not considered an impression seal, but may be used at the discretion of the licensee for the purpose of this rule. A rubber stamp signature is not permitted. A registrant or licensee may place their seal and signature on electronic data only when required to do so by a public entity (i.e. municipality, state agency etc.). A [~~at the surveyor's discretion, provided that a~~] hard copy form bearing the original signature and seal must be [~~is signed, sealed and~~] retained by the surveyor.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 28, 2006.

TRD-200603475
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-5263

♦ ♦ ♦

CHAPTER 663. STANDARDS OF RESPONSIBILITY AND RULES OF CONDUCT

SUBCHAPTER B. PROFESSIONAL AND TECHNICAL STANDARDS

22 TAC §663.17

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §663.17, concerning Monumentation. This section identifies what the registered land surveyor is required to do in regards to monumentation.

The amendment will further clarify the procedures that a land surveyor must follow in setting monumentation for subdivisions.

Sandy Smith, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering the amended section.

Ms. Smith has also determined that for each year of the first five years the amendment is in effect the public will benefit from the amended rule because it will clarify the monumentation process.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the amendment as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposed change to the section has been published in the *Texas Register*.

The amendment is proposed pursuant to Title 6, Subtitle C, §1071.151, Occupations Code, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§663.17. Monumentation.

(a) - (d) (No change.)

(e) Subdivisions that contain more than 20 lots and require infrastructure construction must have exterior corner monumentation set prior to plat recordation. It is the responsibility of the subdivider to ensure that the setting of interior lot corners commences within thirty (30) days of completion of the construction of infrastructure improvements and completed within 6 months of the commencement date by the Surveyor who certified the plat. If the surveyor who certified the plat is not available, the Surveyor who sets the interior corners shall file an Amending Plat per V.T.C.A. Local Government Code §212.016. The Surveyor setting the interior lot corners may extend the 6 month time period for good cause if approved by the local authority. The Surveyor certifying the subdivision plat shall be responsible for notifying the subdivider of this requirement by either including a statement regarding this responsibility in the executed contract for services or by letter sent certified mail, return receipt requested. If the subdivision is developed in phases, the interior corners of each phase may be staked by separate Surveyors, provided the above stated time limits are met.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 28, 2006.

TRD-200603476
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-5263

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 229. FOOD AND DRUG

The Executive Commissioner of Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes new §§229.40, 229.41, 229.241 - 229.252, and 229.419 - 229.430, concerning the regulation of cosmetics, the licensing of wholesale distributors of nonprescription drugs--including good manufacturing practices, and the licensing of wholesale distributors of prescription drugs--including good manufacturing practices. The department also proposes the repeal of §§229.251 - 229.254, concerning the licensing of wholesale distributors of drugs--including good manufacturing practices.

BACKGROUND AND PURPOSE

The new sections are necessary to comply with amendments to Health and Safety Code, Chapter 431, Subchapters I and N, relating to the licensing and regulation of nonprescription and prescription drugs. Subchapter I of the statute sets forth the standards for the licensing and regulation of nonprescription drugs and requires the department to adopt rules to implement and enforce the subchapter. Existing §§229.251 - 229.254 in Subchapter O of Chapter 229 of this title originally set forth the requirements for all drug and cosmetic manufacturers and distributors, but is now being proposed for repeal in order to separate the licensing and regulation of the various commodities.

SECTION-BY-SECTION SUMMARY

New §229.40 and §229.41 reflect the regulations for cosmetic manufacturing and labeling, setting out the Scope and Purpose and adopting by reference the federal requirements for cosmetics.

New §§229.241 - 229.252 set forth the licensing and regulation of manufacturers and distributors of nonprescription drugs. Section 229.241 sets forth the purpose of the rules. Section 229.242 adopts by reference the federal requirement for nonprescription drugs. Section 229.243 sets forth the definitions used in the rules. Section 229.244 defines sale to include entire stream of possession of nonprescription drugs until possession by a consumer. Sections 229.245 - 229.248 set out the exemptions from licensing; licensing requirements; licensing procedures; and the requirements for reporting licensure changes. Section 229.249 sets out the licensing fees for each category of license. Section 229.250 sets forth the reasons for refusing to issue a license, for

canceling, suspending, or revoking a license. Section 229.251 sets out the minimum standards for licensure, including good manufacturing practices. Section 229.252 sets out the enforcement and penalties provisions.

New §§229.419 - 229.430 set forth the licensing and regulation of manufacturers and distributors of prescription drugs. Section 229.419 sets forth the purpose of the rules. Section 229.420 adopts by reference the federal requirement for prescription drugs. Section 229.421 sets forth the definitions used in the rules. Section 229.422 defines sale to include entire stream of possession of prescription drugs until possession by a consumer. Section 229.423 sets out the exemptions from licensing. Section 229.424 outlines licensing requirements. Section 229.425 sets forth the licensing procedures, and §229.426 sets forth the requirements for reporting licensure changes. Section 229.427 sets out the licensing fees for each category of license. Section 229.428 sets forth the reasons for refusing to issue a license, for canceling, suspending, or revoking a license. Section 229.429 sets out the minimum standards for licensure, including good manufacturing practices. Section 229.430 outlines enforcement and penalties provisions.

FISCAL NOTE

Susan E. Tennyson, Section Director, Environmental and Consumer Safety Section, has determined that for each calendar year of the first five years the sections are in effect, there will be fiscal implications to the state as a result of enforcing or administering the sections as proposed. The effect on state government will be an estimated increase in revenue for the state of $462,325 in fiscal year 2006, and $462,325 in each of the fiscal years 2007 through 2010. These additional revenues will offset the increased costs associated with the legislative increase in pay, longevity pay, and travel reimbursement, as well as the costs of regulatory oversight. Implementation of the proposed sections will not result in any fiscal implications for local governments.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Tennyson has also determined that there are anticipated economic costs to small businesses or micro-businesses required to comply with the sections as proposed. There will be an increase in the licensing fees for businesses or persons required to maintain a prescription drug or nonprescription drug license. The probable economic cost to businesses or persons required to comply with the fee for the license will be an increase of approximately 30% to 35% for a two-year license. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Tennyson has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is a reduction in the diversion of regulated products and in the amount of counterfeit prescription drugs in the marketplace.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Tom Brinck, Drugs and Medical Devices Group, Environmental and Consumer Safety Section, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0243, or by e-mail to Tom.Brinck@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Cathy Campbell, certifies that the proposed repeal and new rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

SUBCHAPTER D. REGULATION OF COSMETICS

25 TAC §229.40, §229.41

STATUTORY AUTHORITY

The proposed new sections are authorized by Health and Safety Code, §431.241, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules necessary for the implementation and enforcement of Chapter 431 by the department; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed new sections affect Health and Safety Code, Chapters 12, 431, and 1001; and Government Code, Chapter 531.

§229.40. Purpose.

(a) These sections set forth the requirements for the sale of cosmetics in this state.

(b) A "cosmetic" means articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part of the human body for cleaning, beautifying, promoting attractiveness, or altering the appearance, and articles intended for use as a component of those articles. The term does not include soap.

§229.41. Applicable Laws and Regulations.

(a) The department adopts by reference the following laws and regulations:

(1) Federal Food, Drug, and Cosmetic Act, 21 United States Code, et seq., as amended;

(2) 21 Code of Federal Regulations (CFR), Part 700, General, as amended;

(3) 21 CFR, Part 701, Cosmetic Labeling, as amended; and

(4) 21 CFR, Part 740, Cosmetic Product Warning Statements, as amended.

(b) Copies of these laws and regulations are indexed and filed at the department, 1100 West 49th Street, Austin, Texas 78756, and are available for inspection during normal working hours, 8:00 a.m. - 5:00 p.m. (except weekends and holidays). Electronic copies of these laws and regulations are available online at http://www.dshs.state.tx.us/license.shtm.

(c) Nothing in these sections shall relieve any person of the responsibility for compliance with other applicable Texas and federal laws and regulations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603574
Cathy Campbell
General Counsel
Department of State Health Services
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

SUBCHAPTER O. LICENSING OF WHOLESALE DISTRIBUTORS OF NONPRESCRIPTION DRUGS--INCLUDING GOOD MANUFACTURING PRACTICES

25 TAC §§229.241 - 229.252

The proposed new sections are authorized by Health and Safety Code, §431.241, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules necessary for the implementation and enforcement of Chapter 431 by the department; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed new sections affect Health and Safety Code, Chapters 12, 431, and 1001; and Government Code, Chapter 531.

§229.241. Purpose.

These sections provide for the minimum licensing standards necessary to ensure the safety and efficacy of nonprescription drugs offered for sale by wholesale distributors.

§229.242. Applicable Laws and Regulations.

(a) The department adopts by reference the following laws and regulations:

(1) Federal Food, Drug, and Cosmetic Act, 21 United States Code, et seq., as amended;

(2) 9 Code of Federal Regulations (CFR), Part 113, Standard Requirements, as amended;

(3) 21 CFR, Part 70, Color Additives, as amended;

(4) 21 CFR, Part 71, Color Additive Petitions, as amended;

(5) 21 CFR, Part 73, Listing of Color Additives Exempt From Certification, as amended;

(6) 21 CFR, Part 74, Listing of Color Additives Subject to Certification, as amended;

(7) 21 CFR, Part 80, Color Additive Certification, as amended;

(8) 21 CFR, Part 81, General Specifications and General Restrictions for Provisional Color Additives for use in Foods, Drugs, and Cosmetics, as amended;

(9) 21 CFR, Part 82, Listing of Certified Provisionally Listed Colors and Specifications, as amended;

(10) 21 CFR, Part 201, Labeling, as amended;

(11) 21 CFR, Part 206, Imprinting of Solid Oral Dosage Form Drug Products for Human Use, as amended;

(12) 21 CFR, Part 207, Registration of Producers of Drugs and Listing of Drugs in Commercial Distribution, as amended;

(13) 21 CFR, Part 210, Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding of Drugs; General, as amended;

(14) 21 CFR, Part 211, Current Good Manufacturing Practice for Finished Pharmaceuticals, as amended;

(15) 21 CFR, Part 225, Current Good Manufacturing Practice for Medicated Feeds, as amended;

(16) 21 CFR, Part 226, Current Good Manufacturing Practice for Type A Medicated Articles, as amended;

(17) 21 CFR, Part 250, Special Requirements For Specific Human Drugs, as amended;

(18) 21 CFR, Part 299, Drugs; Official Names and Established Names, as amended;

(19) 21 CFR, Part 300, General, as amended;

(20) 21 CFR, Part 310, New Drugs, as amended;

(21) 21 CFR, Part 312, Investigational New Drug Application, as amended;

(22) 21 CFR, Part 314, Applications for FDA Approval to Market a New Drug or an Antibiotic Drug, as amended;

(23) 21 CFR, Part 316, Orphan Drugs, as amended;

(24) 21 CFR, Part 320, Bioavailability and Bioequivalence Requirements, as amended;

(25) 21 CFR, Part 328, Over-the-Counter (OTC) Drug Products Intended for Oral Ingestion that Contain Alcohol, as amended;

(26) Part 330, Over-the-Counter (OTC) Human Drugs Which are Generally Recognized as Safe and Effective and Not Misbranded, as amended;

(27) 21 CFR, Part 331, Antacid Products for Over-the-Counter (OTC) Human Use, as amended;

(28) 21 CFR, Part 332, Antiflatulent Products for Over-the-Counter (OTC) Human Use, as amended;

(29) 21 CFR, Part 333, Topical Antimicrobial Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(30) 21 CFR, Part 335, Antidiarrheal Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(31) 21 CFR, Part 336, Antiemetic Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(32) 21 CFR, Part 338, Nighttime Sleep-aid Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(33) 21 CFR, Part 340, Stimulant Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(34) 21 CFR, Part 341, Cold, Cough, Allergy, Bronchodilator, and Anti-asthmatic Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(35) 21 CFR, Part 343, Internal Analgesic, Antipyretic, and Antirheumatic Drug Products for Over-The-Counter (OTC) Human Use, as amended;

(36) 21 CFR, Part 344, Topical OTIC Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(37) 21 CFR, Part 346, Anorectal Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(38) 21 CFR, Part 347, Skin Protectant Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(39) 21 CFR, Part 348, External Analgesic Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(40) 21 CFR, Part 349, Ophthalmic Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(41) 21 CFR, Part 350, Antiperspirant Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(42) 21 CFR, Part 352, Sunscreen Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(43) 21 CFR, Part 355, Anticaries Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(44) 21 CFR, Part 357, Miscellaneous Internal Drug Products for Over-the-Counter (OTC) Human Use, as amended;

(45) 21 CFR, Part 358, Miscellaneous External Drug Products for Over-the-Counter (OTC) Human Use, as amended; and

(46) 21 CFR, Part 369, Interpretive Statements Re: Warnings on Drugs and Devices for Over-the-Counter (OTC) Sales, as amended.

(b) Copies of these laws and regulations are indexed and filed at the department, 1100 West 49th Street, Austin, Texas 78756, and are available for inspection during normal working hours, 8:00 a.m. - 5:00 p.m. (except weekends and holidays). Electronic copies of these laws and regulations are available online at http://www.dshs.state.tx.us/license.shtm.

(c) Nothing in these sections shall relieve any person of the responsibility for compliance with other applicable Texas and federal laws and regulations.

§229.243. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(2) Adulterated drug--Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.111.

(3) Authorized agent--An employee of the department who is designated by the commissioner to enforce the provisions of the Act.

(4) Change of ownership--A sole proprietor who transfers all or part of the facility's ownership to another person or persons; the removal, addition, or substitution of a person or persons as a partner in a facility owned by a partnership; a corporate sale, transfer, reorganization, or merger of the corporation which owns the facility if sale, transfer, reorganization, or merger causes a change in the facility's ownership to another person or persons; or if any other type of association, the removal, addition, or substitution of a person or persons as a principal of such association.

(5) Commissioner--Commissioner of the Department of State Health Services.

(6) Cosmetic--Articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part of the human body for cleaning, beautifying, promoting attractiveness, or altering the appearance, and articles intended for use as a component of those articles. The term does not include soap.

(7) Department--The Department of State Health Services.

(8) Device--An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, that is:

(A) recognized in the official United States Pharmacopoeia National Formulary or any supplement to it;

(B) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease in man or other animals; or

(C) intended to affect the structure or any function of the body of man or other animals and that does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and is not dependent on metabolization for the achievement of any of its principal intended purposes.

(9) Drug--Articles recognized in the official United States Pharmacopoeia National Formulary, or any supplement to it, articles designated or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, articles, other than food, intended to affect the structure or any function of the body of man or other animals, and articles intended for use as a component of any such article. The term does not include devices or their components, parts, or accessories. A food for which a claim is made in accordance with the Federal Act, §403(r), and for which the claim is approved by the U.S. Food and Drug Administration, is not a drug solely because the label or labeling contains such a claim.

(10) Federal Act--Federal Food, Drug, and Cosmetic Act, 21 United States Code, et seq., as amended.

(11) Flea market--A location at which booths or similar spaces are rented or otherwise made available temporarily to two or more persons and at which the persons offer tangible personal property for sale.

(12) Labeling--All labels and other written, printed, or graphic matter:

(A) upon any drug or any of its containers or wrappers; or

(B) accompanying such drug.

(13) Manufacturer--A person who manufactures, prepares, propagates, compounds, processes, packages, or repackages nonprescription drugs, or a person who changes the container, wrapper, or labeling of any nonprescription drug package.

(14) Misbranded drug--Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.112.

(15) Nonprescription drug--Any drug that is not a prescription drug, and includes the term "Over the Counter Drug."

(16) Nonprescription drug product--A finished dosage form, for example, tablet, capsule, solution, etc., that contains an active nonprescription drug ingredient generally, but not necessarily, in association with inactive ingredients. The term also includes a finished dosage form that does not contain an active ingredient but is intended to be used as a placebo. Any nonprescription drug product that is also a cosmetic or device or component thereof is also subject to the applicable requirements of the Federal Act, Chapters V and VI, and Subchapters E and F; and Subchapter D of this chapter (relating to Regulation of Cosmetics) and Subchapter X of this chapter (relating to Licensing of Device Distributors and Manufacturers).

(17) Person--An individual, corporation, business trust, estate, trust, partnership, association, or any other public or private legal entity.

(18) Place of business--Each location at which a nonprescription drug for wholesale distribution is located.

(19) Prescription drug--Any drug (including any biological product, except for blood and blood components intended for transfusion or biological products that are also medical devices) required by Federal law (including Federal regulation) to be dispensed only by a prescription, including finished dosage forms and bulk drug substances subject to the Federal Act, §503(b).

(20) Wholesale distribution--Distribution to a person other than a consumer or patient, including, but not limited to distribution to any person by a manufacturer, repackager, own label distributor, broker, jobber, warehouse, or wholesaler.

§229.244. Sale of Nonprescription Drugs.

Any reference in these sections to the sale of nonprescription drugs shall be considered to include the manufacture, packaging, exposure, offer, possession, and holding of any nonprescription drug for sale; the sale, dispensing, and giving of any nonprescription drug; and supplying or applying of any nonprescription drug in the operation of any nonprescription drug place of business.

§229.245. Exemption.

(a) A person is exempt from licensing a place of business in accordance with §229.246 of this title (relating to Licensure Requirements) if the person holds a license for the place of business issued by the department under Subchapter W of this chapter (relating to Licensing of Wholesale Distributors of Prescription Drugs--Including Good Manufacturing Practices).

(b) An exemption from the licensing requirement granted in subsection (a) of this section does not constitute an exemption from other applicable requirements for nonprescription drugs in these sections or under the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

§229.246. Licensure Requirements.

(a) General. Except as provided by §229.245 of this title (relating to Exemption), a person may not engage in the wholesale distribution of nonprescription drugs in Texas unless the person has a valid license from the department for each place of business.

(b) Out-of-state place of business. Except as provided by §229.245 of this title, a person who engages in the wholesale distribution of nonprescription drugs from outside this state may only engage in the wholesale distribution of nonprescription drugs in this state if the person holds a license as required under subsection (a) of this section.

(c) Combination product. If the United States Food and Drug Administration determines, with respect to a product that is a combination of a nonprescription drug and a device, that the primary mode of action of the product is as a nonprescription drug, a wholesale distributor of such a product is subject to licensure as described in this section.

(d) Display of license. The license shall be displayed in an open public area at each place of business.

(e) New place of business. Each person acquiring or establishing a place of business for the purpose of wholesale distribution of nonprescription drugs after the effective date of these sections shall apply to the department for a license of such business prior to beginning operation.

(f) Two or more places of business. If the wholesale distributor of nonprescription drugs operates more than one place of business, the wholesale distributor of nonprescription drugs shall license each place of business separately.

(g) Pre-licensing inspection. The applicant shall cooperate with any pre-licensing inspection by the department of the applicant's place of business. The department may accept reports from authorities in other jurisdictions to determine the extent of compliance with the minimum standards in these sections for applicants located out-of-state.

(h) Issuance of license. In accordance with §229.281 of this title (relating to Processing License/Permit Applications Relating to Food and Drug Operations), the department may license a wholesale distributor of nonprescription drugs who meets the requirements of these sections, and pays all license fees in compliance with §229.249 of this title (relating to Licensure Fees).

(i) Transfer of license. Licenses shall not be transferable from one person to another or from one place of business to another.

(j) License term. Unless the license is amended as provided in subsection (k) of this section or suspended or revoked as provided in §229.250 of this title (relating to Refusal, Cancellation, Suspension, or Revocation of a License), the license is valid for two years.

(k) Amendment of license. A license that is amended, including a change of name, ownership, or a notification of a change in the location of a licensed place of business will require submission of an application as outlined in §229.247 of this title (relating to Licensing Procedures) and submission of fees as outlined in §229.249 of this title.

(l) Renewal of license.

(1) The license application as outlined in §229.247 of this title and nonrefundable licensing fees as outlined in §229.249 of this title for each place of business shall be submitted to the department prior to the expiration date of the current license. A person who files a renewal application after the expiration date must pay an additional $100 as a delinquency fee.

(2) A licensee who fails to submit a renewal application prior to the current licensure expiration date and continues operations

may be subject to the enforcement and penalty provisions in §229.252 of this title (relating to Enforcement and Penalties), and/or the refusal, cancellation, suspension and revocation provisions in §229.250 of this title.

(3) A renewal license shall only be issued when all past due license fees and delinquency fees are paid.

§229.247. Licensing Procedures.

(a) License application forms. License application forms may be obtained from the department, 1100 West 49th Street, Austin, Texas, 78756, or online at http://www.dshs.state.tx.us/license.shtm.

(b) Contents of license application. The application for licensure as a wholesale distributor of nonprescription drugs shall be signed and verified, submitted on a license application form furnished by the department, and contain the following information:

(1) the name of the legal entity to be licensed, including the name under which the business is conducted;

(2) the address of each place of business that is licensed;

(3) if a proprietorship, the name and residence address of the proprietor; if a partnership, the names and residence addresses of all partners; if a corporation, the date and place of incorporation and name and address of its registered agent in the state and corporation charter number; or if any other type of association, the names of the principals of such association;

(4) the name, residence address, and valid driver license number for each individual in an actual administrative capacity which, in the case of proprietorship, shall be the managing proprietor; partnership, the managing partner; corporation, the officers and directors; or those in a managerial capacity in any other type of association;

(5) for each place of business, the residence address of the individual in charge thereof;

(6) a list of categories which must be marked and adhered to in the determination and payment of the fee; and

(7) a statement verified by the applicant's signature that acknowledges the applicant has read, understood, and agrees to abide by the provisions of these sections and those of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(c) Renewal license application. The renewal application for licensure as a wholesale distributor of nonprescription drugs shall be made on a license application form furnished by the department.

(d) Texas Online. Applicants may submit initial and renewal license applications under these sections electronically by the Internet through Texas Online at www.texasonline.state.tx.us. The department is authorized to collect fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

§229.248. Report of Changes.

(a) Change in the content of a license application. The license holder shall notify the department in writing within ten days of any change which would render the information contained in the application for the license, reported pursuant to §229.247 of this title (relating to Licensing Procedures), no longer accurate. Failure to inform the department no later than ten days of a change in the information required in the application for a license may result in a suspension or revocation of the license.

(b) Change in location of place of business. Not fewer than 30 days in advance of the change, the licensee shall notify the department in writing of the licensee's intent to change the location of a licensed place of business. The notice shall include the address of the new location, and the name and residence address of the individual in charge of the business at the new location. Not more than 10 days after the completion of the change of location, the licensee shall notify the department in writing to confirm the completion of the change of location, and provide verification of the information previously provided or correct and confirm any information that has changed since providing the notice of intent. The notice and confirmation required by this subsection will be deemed adequate if the licensee sends the notices by certified mail, return receipt requested, to the department at 1100 West 49th Street, Austin, Texas 78756, or submits them electronically through the Texas Online Internet website.

§229.249. Licensure Fees.

(a) License fee. Except as provided by §229.245 of this title (relating to Exemption), no person may operate or conduct business as a wholesale distributor of nonprescription drugs without first obtaining a license from the department. All applicants for an initial wholesale distributor of nonprescription drugs license or a renewal license shall pay a licensing fee unless otherwise exempt as provided by subsection (c) of this section. All fees are nonrefundable. Licenses are issued for two-year terms. A license shall only be issued when all past due license fees and delinquency fees are paid.

(1) In-state wholesale distributors of nonprescription drugs who are not manufacturers shall pay a two-year license fee based on the gross annual sales of all nonprescription drugs.

(A) For a wholesale distributor with gross annual nonprescription drug sales of $0 - $199,999.99, the fees are:

(i) $1,040 for a two-year license;

(ii) $1,040 for a two-year license that is amended due to a change of ownership; and

(iii) $520 for a license that is amended during the current licensure period due to minor changes.

(B) For a wholesale distributor with gross annual nonprescription drug sales of $200,000 - $19,999,999.99, the fees are:

(i) $1,690 for a two-year license;

(ii) $1,690 for a two-year license that is amended due to a change of ownership; and

(iii) $845 for a license that is amended during the current licensure period due to minor changes.

(C) For a wholesale distributor with gross annual nonprescription drug sales greater than or equal to $20 million, the fees are:

(i) $2,210 for a two-year license;

(ii) $2,210 for a two-year license that is amended due to a change of ownership; and

(iii) $1,105 for a license that is amended during the current licensure period due to minor changes.

(2) In-state wholesale distributors of nonprescription drugs who are not manufacturers and who also are required to be licensed as a device distributor under §229.439(a) of this title (relating to Licensure Fees) or as a wholesale food distributor under §229.182(a)(3) of this title (relating to Licensing/Registration Fee and Procedures) shall pay a combined two-year license fee for each place of business. License fees are based on the combined gross annual sales of these regulated products (foods, drugs, and/or devices).

(A) For each place of business having combined gross annual sales of $0 - $199,999.99, the fees are:

(i) $520 for a two-year license;

(ii) $520 for a two-year license that is amended due to a change of ownership; and

(iii) $260 for a license that is amended during the current licensure period due to minor changes.

(B) For each place of business having combined gross annual sales of $200,000 - $499,999.99, the fees are:

(i) $780 for a two-year license;

(ii) $780 for a two-year license that is amended due to a change of ownership; and

(iii) $390 for a license that is amended during the current licensure period due to minor changes.

(C) For each place of business having combined gross annual sales of $500,000 - $999,999.99, the fees are:

(i) $1,040 for a two-year license;

(ii) $1,040 for a two-year license that is amended due to a change of ownership; and

(iii) $520 for a license that is amended during the current licensure period due to minor changes.

(D) For each place of business having combined gross annual sales of $1 million - $9,999,999.99, the fees are:

(i) $1,300 for a two-year license;

(ii) $1,300 for a two-year license that is amended due to a change of ownership; and

(iii) $650 for a license that is amended during the current licensure period due to minor changes.

(E) For each place of business having combined gross annual sales greater than or equal to $10 million, the fees are:

(i) $1,950 for a two-year license;

(ii) $1,950 for a two-year license that is amended due to a change of ownership; and

(iii) $975 for a license that is amended during the current licensure period due to minor changes.

(3) In-state wholesale distributors of nonprescription drugs who are manufacturers shall pay a two-year license fee based on the gross annual sales of all nonprescription drugs.

(A) For a wholesale distributor with gross annual nonprescription drug sales of $0 - $199,999.99, the fees are:

(i) $1,040 for a two-year license;

(ii) $1,040 for a two-year license that is amended due to a change of ownership; and

(iii) $520 for a license that is amended during the current licensure period due to minor changes.

(B) For a wholesale distributor with gross annual nonprescription drug sales of $200,000 - $19,999,999.99, the fees are:

(i) $1,690 for a two-year license;

(ii) $1,690 for a two-year license that is amended due to a change of ownership; and

(iii) $845 for a license that is amended during the current licensure period due to minor changes.

(C) For a wholesale distributor with gross annual nonprescription drug sales greater than or equal to $20 million, the fees are:

(i) $2,210 for a two-year license;

(ii) $2,210 for a two-year license that is amended due to a change of ownership; and

(iii) $1,105 for a license that is amended during the current licensure period due to minor changes.

(4) Out-of-state wholesale distributors of nonprescription drugs shall pay a two-year license fee based on all gross annual sales of nonprescription drugs delivered into Texas.

(A) For each wholesale distributor with gross annual nonprescription drug sales of $0 - $19,999,999, the fees are:

(i) $1,300 for a two-year license;

(ii) $1,300 for a two-year license that is amended due to a change of ownership; and

(iii) $650 for a license that is amended during the current licensure period due to minor changes.

(B) For each wholesale distributor with gross annual nonprescription drug sales of greater than or equal to $20 million, the fees are:

(i) $1,950 for a two-year license;

(ii) $1,950 for a two-year license that is amended due to a change of ownership; and

(iii) $975 for a license that is amended during the current licensure period due to minor changes.

(b) Proration of license fees. A person that has more than one place of business may request a one-time proration of the license fees when applying for a license for each new place of business. Upon approval by the department, the license for the new place of business will have a renewal date that is the same as the firm's other licensed places of business.

(c) Exemption from license fees. A person is exempt from the license fees required by this section if the person is a charitable organization, as described in the Internal Revenue Code of 1986, §501(c)(3), or a nonprofit affiliate of the organization, to the extent otherwise permitted by law.

§229.250. Refusal, Cancellation, Suspension or Revocation of License.

(a) The commissioner may refuse an application for a wholesale distributor of nonprescription drugs license or may suspend or revoke such a license if the applicant or licensee:

(1) has been convicted of a felony or misdemeanor that involves moral turpitude;

(2) is an association, partnership, or corporation and the managing officer and/or any officer or director of the corporation has been convicted of a felony or misdemeanor that involves moral turpitude;

(3) is an association, partnership, or corporation and the managing officer and/or any officer or director of the corporation has been convicted of a felony or misdemeanor involving the illegal use, sale, or transportation of intoxicating liquors, narcotic drugs, barbiturates, amphetamines, desoxyephedrine, their compounds or derivatives, or any other dangerous or habit-forming drugs;

(4) has violated any of the provisions of the Texas, Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431 (Act) or these sections;

(5) has violated the Health and Safety Code, §431.021(1)(3), concerning the counterfeiting of a drug or the sale or holding for sale of a counterfeit drug;

(6) has violated the Health and Safety Code, Chapter 481 (Texas Controlled Substance Act), or the Health and Safety Code, Chapter 483 (Dangerous Drug Act);

(7) has violated the rules of the director of the Department of Public Safety, including being responsible for a significant discrepancy in the records that state law requires the applicant or licensee to maintain;

(8) has failed to complete a license application or submits an application that contains false, misleading, or incorrect information or contains information that cannot be verified by the department;

(9) has failed to pay a license fee or a renewal fee for a license; or

(10) has obtained or attempted to obtain a license by fraud or deception.

(b) The department may, after providing opportunity for hearing, refuse to license a wholesale distributor of nonprescription drugs, or may suspend or revoke a license for violations of the requirements in these sections or for any of the reasons described in the Act.

(c) Any hearings for the refusal, suspension, or revocation of a license are governed by §§1.21, 1.23, 1.25, and 1.27 of this title (relating to Formal Hearing Procedures).

(d) If the department suspends a license, the suspension shall remain in effect until the department determines that the reason for the suspension no longer exists. If the suspension overlaps a renewal date, the suspended license holder shall comply with the renewal procedures in §229.247 of this title (relating to Licensing Procedures); however, the department may choose not to renew the license until the department determines that the reason for suspension no longer exists.

(e) If the department revokes or does not renew a license, a person may reapply for a license by complying with the requirements and procedures in §229.247 of this title at the time of reapplication. The department may refuse to issue a license if the reason for revocation or non-renewal continues to exist.

(f) A license issued under these sections shall be returned to the department if the person's place of business:

(1) ceases business or otherwise ceases operation on a permanent basis;

(2) relocates; or

(3) changes name or ownership. For a corporation, an ownership change is deemed to have occurred, resulting in the necessity to return the license to the department, when 5.0% or more of the share of stock of a corporation is transferred from one person to another.

§229.251. Minimum Standards for Licensure.

(a) General requirements. All persons engaged in the wholesale distribution of nonprescription drugs must comply with the applicable minimum standards in this section, in addition to the statutory requirements contained in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431 (Act) and those requirements adopted in §229.242 of this title (relating to Applicable Laws and Regulations). For the purpose of this section, the policies described in the United States Food and Drug Administration's (FDA's) Compliance Policy Guides as they apply to nonprescription drugs shall be the policies of the department.

(b) Federal establishment registration and drug listing. All persons who operate as nonprescription drug manufacturers in Texas shall meet the requirements in 21 Code of Federal Regulations (CFR), Part 207, titled "Registration of Producers of Drugs and Listing of Drugs in Commercial Distribution." New nonprescription drugs offered for sale by wholesale distributors shall have met, if applicable, the requirements of 21 CFR, Part 314, titled "Applications for FDA Approval to Market a New Drug."

(c) Good manufacturing practices. Manufacturers of nonprescription drug products shall be in compliance with the applicable requirements in 21 CFR, Part 210, titled "Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding of Drugs"; 21 CFR, Part 211, titled "Current Good Manufacturing Practice for Finished Pharmaceuticals; General"; 21 CFR, Part 225, titled "Current Good Manufacturing Practice for Medicated Feeds"; and 21 CFR, Part 226, titled "Current Good Manufacturing Practice for Type A Medicated Article." The regulations in these parts govern the methods used in, and the facilities or controls used for, the manufacture, processing, packing, or holding of a drug to assure that each drug meets the requirements of the Federal Act as to safety, and has the identity and strength and meets the quality and purity characteristics that it purports or is represented to possess.

(d) Buildings and facilities.

(1) All manufacturing, processing, packing, or holding of drugs by nonprescription drug manufacturers shall take place in buildings and facilities described in subsection (c) of this section.

(2) No manufacturing, processing, packing, or holding of nonprescription drugs shall be conducted in any personal residence.

(3) No sale of nonprescription drugs shall be conducted in any flea market.

(4) Any place of business used by a wholesale distributor of nonprescription drugs who is not a manufacturer to store, warehouse, hold, offer, transport, or display drugs shall:

(A) be of suitable size and construction to facilitate cleaning, maintenance, and proper operations;

(B) have storage areas designed to provide adequate lighting, ventilation, temperature, sanitation, humidity, and space;

(C) be maintained in a clean and orderly condition;

(D) be free from infestation by insects, rodents, birds, or vermin of any kind; and

(E) have a quarantine area for storage of drugs that are outdated, damaged, deteriorated, misbranded, or adulterated.

(e) Storage of nonprescription drugs. All nonprescription drugs stored by wholesale distributors shall be held at appropriate temperatures and under appropriate conditions in accordance with requirements, if any, in the labeling of such drugs.

(f) Operating procedures for wholesale distributors who are not manufacturers. Written procedures describing the holding of nonprescription drug products by wholesale distributors of nonprescription drugs who are not manufacturers shall be established and followed and shall include:

(1) a procedure for identifying and retrieving nonprescription drug products that are subject to a recall; and

(2) a quarantine procedure for nonprescription drug products that have expired; are subject to recall; or are otherwise determined to be adulterated or misbranded for the return, destruction, or other disposal of those items.

(g) Nonprescription drug labeling. Nonprescription drugs sold by wholesale distributors shall meet the labeling requirements of the Act and 21 CFR, Part 201, titled "Labeling."

(h) Nonprescription drugs that are combination products. Any nonprescription drug that is a combination product as described in §229.246(c) of this title (relating to Licensure Requirements) is also subject to the applicable requirements in Subchapter X of this chapter (relating to Licensing of Device Distributors and Manufacturers).

(i) Nonprescription drugs that are also cosmetics. Any nonprescription drug that is also a cosmetic or component thereof is also subject to the applicable requirements of Subchapter D of this chapter (relating to Regulation of Cosmetics).

§229.252. Enforcement and Penalties.

(a) Inspection. To enforce these sections or the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431 (Act), the commissioner, an authorized agent, or a health authority may, on presenting appropriate credentials to the owner, operator, or agent in charge of a place of business:

(1) enter at reasonable times a place of business, including a factory or warehouse, in which a nonprescription drug is manufactured, packed, or held for introduction into commerce or held after the introduction;

(2) enter a vehicle being used to transport or hold a nonprescription drug in commerce; or

(3) inspect at reasonable times, within reasonable limits, and in a reasonable manner, the place of business or vehicle and all equipment, finished and unfinished materials, containers, and labeling of any item, and obtain samples necessary for the enforcement of these sections or the Act.

(b) Receipt for samples. An authorized agent or health authority who makes an inspection of a place of business, including a factory or warehouse, and obtains a sample during or on completion of the inspection and before leaving the place of business, shall give to the owner, operator, or the owner's or operator's agent a receipt describing the sample.

(c) Access to records.

(1) A person who is required to maintain records referenced in these sections or under the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431 (Act), or Federal Food, Drug, and Cosmetic Act (Federal Act), Chapter V, or a person who is in charge or custody of those records shall, at the request of an authorized agent or health authority, permit the authorized agent or health authority at all reasonable times access to and to copy and verify the records.

(2) A person, including a carrier engaged in commerce, or other person receiving a nonprescription drug in commerce or holding a nonprescription drug received in commerce shall, at the request of an authorized agent, permit the authorized agent at all reasonable times to have access to and to copy and verify all records showing:

(A) the movement in commerce of any nonprescription drug;

(B) the holding of any nonprescription drug after movement in commerce; and

(C) the quantity, shipper, and consignee of any nonprescription drug.

(d) Retention of records. Records required by these sections shall be maintained at the place of business or other location that is reasonably accessible for a period of at least three years following disposition of the nonprescription drug unless a greater period of time is required by laws and regulations adopted in §229.242 of this title (relating to Applicable Laws and Regulations).

(e) Adulterated and misbranded nonprescription drug. If the department identifies an adulterated or misbranded nonprescription drug, the department may impose the applicable provisions of Subchapter C of the Act including, but not limited to: detention, emergency order, recall, condemnation, destruction, injunction, civil penalties, criminal penalties, and/or administrative penalties. Administrative and civil penalties will be assessed using the Severity Levels contained in §229.251 of this title (relating to Minimum Standards for Licensure).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603575
Cathy Campbell
General Counsel
Department of State Health Services
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 458-7111 x6972

SUBCHAPTER O. LICENSING OF WHOLESALE DISTRIBUTORS OF DRUGS--INCLUDING GOOD MANUFACTURING PRACTICES

25 TAC §§229.251 - 229.254

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The proposed repeal is authorized by Health and Safety Code, §431.241, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules necessary for the implementation and enforcement of Chapter 431 by the department; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed repeal affects Health and Safety Code, Chapters 12, 431, and 1001; and Government Code, Chapter 531.

§229.251. Definitions.

§229.252. Licensing Fee and Procedures.

§229.253. Minimum Standards for Licensing.

§229.254. Refusal, Revocation, or Suspension of License.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603576
Cathy Campbell
General Counsel
Department of State Health Services
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

SUBCHAPTER W. LICENSING OF WHOLESALE DISTRIBUTORS OF PRESCRIPTION DRUGS--INCLUDING GOOD MANUFACTURING PRACTICES

25 TAC §§229.419 - 229.430

The proposed new sections are authorized by Health and Safety Code, §431.241, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules necessary for the implementation and enforcement of Chapter 431 by the department; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed new sections affect Health and Safety Code, Chapters 12, 431, and 1001; and Government Code, Chapter 531.

§229.419. Purpose.

These sections provide for the minimum licensing standards necessary to ensure the safety and efficacy of prescription drugs offered for sale by wholesale distributors.

§229.420. Applicable Laws and Regulations.

(a) The department adopts by reference the following laws and regulations:

(1) Federal Food, Drug, and Cosmetic Act, 21 United States Code, et seq., as amended;

(2) 9 Code of Federal Regulations (CFR), Part 113, Standard Requirements, as amended;

(3) 21 CFR, Part 70, Color Additives, as amended;

(4) 21 CFR, Part 71, Color Additive Petitions, as amended;

(5) 21 CFR, Part 73, Listing of Color Additives Exempt From Certification, as amended;

(6) 21 CFR, Part 74, Listing of Color Additives Subject to Certification, as amended;

(7) 21 CFR, Part 80, Color Additive Certification, as amended;

(8) 21 CFR, Part 81, General Specifications and General Restrictions for Provisional Color Additives for use in Foods, Drugs, and Cosmetics, as amended;

(9) 21 CFR, Part 82, Listing of Certified Provisionally Listed Colors and Specifications, as amended;

(10) 21 CFR, Part 200, General, as amended;

(11) 21 CFR, Part 201, Labeling, as amended;

(12) 21 CFR, Part 202, Prescription Drug Advertising, as amended;

(13) 21 CFR, Part 203, Prescription Drug Marketing, as amended;

(14) 21 CFR, Part 205, Guidelines for State Licensing of Wholesale Prescription Drug Distributors, as amended;

(15) 21 CFR, Part 206, Imprinting of Solid Oral Dosage Form Drug Products for Human Use, as amended;

(16) 21 CFR, Part 207, Registration of Producers of Drugs and Listing of Drugs in Commercial Distribution, as amended;

(17) 21 CFR, Part 210, Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding of Drugs; General, as amended;

(18) 21 CFR, Part 211, Current Good Manufacturing Practice for Finished Pharmaceuticals, as amended;

(19) 21 CFR, Part 216, Pharmacy Compounding, as amended;

(20) 21 CFR, Part 225, Current Good Manufacturing Practice for Medicated Feeds, as amended;

(21) 21 CFR, Part 226, Current Good Manufacturing Practice for Type A Medicated Articles, as amended;

(22) 21 CFR, Part 250, Special Requirements For Specific Human Drugs, as amended;

(23) 21 CFR, Part 290, Controlled Drugs, as amended;

(24) 21 CFR, Part 299, Drugs; Official Names and Established Names, as amended;

(25) 21 CFR, Part 300, General, as amended;

(26) 21 CFR, Part 310, New Drugs, as amended;

(27) 21 CFR, Part 312, Investigational New Drug Application, as amended;

(28) 21 CFR, Part 314, Applications for FDA Approval to Market a New Drug or an Antibiotic Drug, as amended;

(29) 21 CFR, Part 315, Diagnostic Radiopharmaceuticals, as amended;

(30) 21 CFR, Part 316, Orphan Drugs, as amended;

(31) 21 CFR, Part 320, Bioavailability and Bioequivalence Requirements, as amended;

(32) 21 CFR, Part 361, Prescription Drugs for Human Use Generally Recognized as Safe and Effective and Not Misbranded: Drugs Used In Research, as amended;

(33) 21 CFR, Part 429, Drugs Composed Wholly or Partly of Insulin, as amended;

(34) 21 CFR, Part 430, Antibiotic Drugs; General, as amended;

(35) 21 CFR, Part 431, Certification of Antibiotic Drugs, as amended;

(36) 21 CFR, Part 432, Packaging and Labeling of Antibiotic Drugs, as amended;

(37) 21 CFR, Part 433, Exemptions from Antibiotic Certification and Labeling Requirements, as amended;

(38) 21 CFR, Part 436, Tests and Methods of Assay of Antibiotic and Antibiotic-containing Drugs, as amended;

(39) 21 CFR, Part 440, Penicillin Antibiotic Drugs, as amended;

(40) 21 CFR, Part 441, Penem Antibiotic Drugs, as amended;

(41) 21 CFR, Part 442, Cepha Antibiotic Drugs, as amended;

(42) 21 CFR, Part 444, Oligosaccharide Antibiotic Drugs, as amended;

(43) 21 CFR, Part 446, Tetracycline Antibiotic Drugs, as amended;

(44) 21 CFR, Part 448, Peptide Antibiotic Drugs, as amended;

(45) 21 CFR, Part 449, Antifungal Antibiotic Drugs, as amended;

(46) 21 CFR, Part 450, Antitumor Antibiotic Drugs, as amended;

(47) 21 CFR, Part 452, Macrolide Antibiotic Drugs, as amended;

(48) 21 CFR, Part 453, Lincomycin Antibiotic Drugs, as amended;

(49) 21 CFR, Part 455, Certain Other Antibiotic Drugs, as amended;

(50) 21 CFR, Part 460, Antibiotic Drugs Intended for Use in Laboratory Diagnosis of Disease, as amended;

(51) 21 CFR, Part 500, General, as amended;

(52) 21 CFR, Part 510, New Animal Drugs, as amended;

(53) 21 CFR, Part 511, New Animal Drugs for Investigational Use, as amended;

(54) 21 CFR, Part 514, New Animal Drug Applications, as amended;

(55) 21 CFR, Part 515, Medicated Feed Mill License, as amended;

(56) 21 CFR, Part 520, Oral Dosage Form New Animal Drugs, as amended;

(57) 21 CFR, Part 522, Implantation or Injectable Dosage Form New Animal Drugs, as amended;

(58) 21 CFR, Part 524, Opthalmic and Topical Dosage Form New Animal Drugs, as amended;

(59) 21 CFR, Part 526, Intramammary Dosage Forms, as amended;

(60) 21 CFR, Part 529, Certain Other Dosage Form New Animal Drugs, as amended;

(61) 21 CFR, Part 530, Extralabel Drug Use in Animals, as amended;

(62) 21 CFR, Part 556, Tolerances for Residues of New Animal Drugs in Food, as amended;

(63) 21 CFR, Part 558, New Animal Drugs for Use in Animal Feeds, as amended;

(64) 21 CFR, Part 589, Substances Prohibited From Use in Animal Food or Feed, as amended;

(65) 21 CFR, Part 600, Biological Products: General, as amended;

(66) 21 CFR, Part 601, Licensing, as amended;

(67) 21 CFR, Part 610, General Biological Products Standards, as amended;

(68) 21 CFR, Part 650, Additional Standards for Diagnostic Substances Dermal Test, as amended;

(69) 21 CFR, Part 660, Additional Standards for Diagnostic Substances for Laboratory Tests, as amended;

(70) 21 CFR, Part 680, Additional Standards for Miscellaneous Products, as amended; and

(71) 21 CFR, Part 1302, Labeling and Packaging Requirements For Controlled Substances, as amended.

(b) Copies of these laws and regulations are indexed and filed at the department, 1100 West 49th Street, Austin, Texas 78756, and are available for inspection during normal working hours. Electronic copies of these laws and regulations are available online at http://www.dshs.state.tx.us/license.shtm.

(c) Nothing in these sections shall relieve any person of the responsibility for compliance with other applicable Texas and federal laws and regulations.

§229.421. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(2) Adulterated drug--Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.111.

(3) Authorized agent--An employee of the department who is designated by the commissioner to enforce the provisions of the Act.

(4) Change of ownership--A sole proprietor who transfers all or part of the facility's ownership to another person or persons; the removal, addition, or substitution of a person or persons as a partner in a facility owned by a partnership; a corporate sale, transfer, reorganization, or merger of the corporation which owns the facility if sale, transfer, reorganization, or merger causes a change in the facility's ownership to another person or persons; or if any other type of association, the removal, addition, or substitution of a person or persons as a principal of such association.

(5) Commissioner--Commissioner of the Department of State Health Services.

(6) Department--The Department of State Health Services.

(7) Device--An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, that is:

(A) recognized in the official United States Pharmacopoeia National Formulary or any supplement to it;

(B) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease in man or other animals; or

(C) intended to affect the structure or any function of the body of man or other animals and that does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and is not dependent on metabolization for the achievement of any of its principal intended purposes.

(8) Drug--Articles recognized in the official United States Pharmacopoeia National Formulary, or any supplement to it, articles designated or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, articles, other than food, intended to affect the structure or any function of the body of man or other animals, and articles intended for use as a component of any such article. The term does not include devices or their components, parts, or accessories. A food for which a claim is made in accordance with the Federal Act, §403(r), and for which the claim is approved by the U.S. Food and Drug Administration, is not a drug solely because the label or labeling contains such a claim.

(9) Emergency medical reasons--Includes transfers of a prescription drug between a wholesale distributor or pharmacy to alleviate a temporary shortage of a prescription drug arising from delays in or interruption of regular distribution schedules; sales to nearby emergency medical services, i.e., ambulance companies and firefighting organizations in the same state or same marketing or service area, or nearby licensed practitioners of drugs for use in the treatment of acutely ill or injured persons; provision of minimal emergency supplies of drugs to nearby nursing homes for use in emergencies or during hours of the day when necessary drugs cannot be obtained; and transfers of prescription drugs by a retail pharmacy to alleviate a temporary shortage.

(10) Federal Act--Federal Food, Drug, and Cosmetic Act, 21 United States Code, et seq., as amended.

(11) Flea market--A location at which booths or similar spaces are rented or otherwise made available temporarily to two or more persons and at which the persons offer tangible personal property for sale.

(12) Labeling--All labels and other written, printed, or graphic matter:

(A) upon any drug or any of its containers or wrappers; or

(B) accompanying such drug.

(13) Manufacturer--A person who manufactures, prepares, propagates, compounds, processes, packages, or repackages prescription drugs, or a person who changes the container, wrapper, or labeling of any prescription drug package. The term does not include compounding that is done within the practice of pharmacy and pursuant to a prescription drug order or initiative from a practitioner for a patient or prepackaging that is done in accordance with Occupations Code, §562.154.

(14) Misbranded drug--Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.112.

(15) Nonprescription drug--Any drug that is not a prescription drug.

(16) Person--An individual, corporation, business trust, estate, trust, partnership, association, or any other public or private legal entity.

(17) Place of business--Each location at which a prescription drug for wholesale distribution is located.

(18) Prescription drug--Any drug (including any biological product, except for blood and blood components intended for transfusion or biological products that are also medical devices) required by Federal law (including Federal regulation) to be dispensed only by a prescription, including finished dosage forms and bulk drug substances subject to the Federal Act, §503(b).

(19) Repackage--Repackaging or otherwise changing the container, wrapper, or labeling of a drug to further the distribution of a prescription drug. The term does not include repackaging by a pharmacist to dispense a drug to a patient or prepackaging in accordance with Occupations Code, §562.154.

(20) Repackager--A person who engages in repackaging.

(21) Wholesale distribution--Distribution to a person other than a consumer or patient, and includes distribution by a manufacturer, repackager, own label distributor, broker, jobber, warehouse, retail pharmacy that conducts wholesale distribution, or wholesaler. The term does not include:

(A) intracompany sales of prescription drugs, which means transactions or transfers of prescription drugs between a division, subsidiary, parent, or affiliated or related company that is under common ownership and control of a corporate entity;

(B) the sale, purchase, distribution, trade, or transfer of prescription drugs or the offer to sell, purchase, distribute, trade, or transfer a prescription drug for emergency medical reasons;

(C) the distribution of prescription drug samples by a representative of a manufacturer;

(D) the return of drugs by a hospital, health care entity, retail pharmacy, chain pharmacy warehouse, or charitable institution in accordance with 21 CFR, §203.23; or

(E) the delivery by a retail pharmacy of a prescription drug to a patient or a patient's agent under the lawful order of a licensed practitioner.

§229.422. Sale of Prescription Drugs.

Any reference in these sections to the sale of prescription drugs shall be considered to include the manufacture, packaging, exposure, offer, possession, and holding of any prescription drug for sale; the sale, dispensing, and giving of any prescription drug; and supplying or applying of any prescription drug in the operation of any prescription drug place of business.

§229.423. Exemptions.

(a) General. A person who engages in the wholesale distribution of prescription drugs in this state for use in humans is exempt from these sections if the person is exempt under:

(1) the Prescription Drug Marketing Act of 1987 (Act), (21 U.S.C., §353(c)(3)(B));

(2) the regulations adopted by the secretary to administer and enforce that Act;

(3) the interpretations of that Act set forth in the compliance policy manual of the United States Food and Drug Administration; or

(4) the Occupations Code, §562.154.

(b) Exemptions from licensing. Persons who engage in the following types of distribution of prescription drugs for use in humans are exempt from the licensing requirements of these sections, to the extent that it does not violate provisions of the Texas Controlled Substances Act, Health and Safety Code, Chapter 481, or the Texas Dangerous Drug Act, Health and Safety Code, Chapter 483:

(1) intracompany sales;

(2) the purchase or acquisition by a hospital or other health care entity that is a member of a group purchasing organization of a drug for its own use from the group purchasing organization or from other hospitals or health care entities that are members of such organizations;

(3) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug by a charitable organization, as described in the Internal Revenue Code of 1986, §501(c)(3), to a nonprofit affiliate of the organization to the extent otherwise permitted by law;

(4) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug among hospitals or other health care entities that are under common control. For the purpose of this subsection, "common control" means the power to direct or cause the direction of the management and policies of a person or an organization, whether by ownership of stock, voting rights, contract, or otherwise;

(5) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug for emergency medical reasons. For purposes of this section, "emergency medical reasons" includes transfers of prescription drugs by a retail pharmacy to another retail pharmacy to alleviate a temporary shortage;

(6) the sale, purchase, or trade of a drug, an offer to sell, purchase, or trade a drug, or the dispensing of a drug pursuant to a prescription;

(7) the distribution of drug samples by manufacturers' representatives or distributors' representatives; or

(8) the sale, purchase, or trade of blood and blood components intended for transfusion.

(c) Applicability of other requirements. An exemption from the licensing requirements granted in subsection (b) of this section does not constitute an exemption from other applicable requirements for prescription drugs under these sections or under the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(d) Exemption from certain requirements for certain wholesale distributors. A wholesale distributor that distributes only prescription drugs that are medical gases is exempt from the requirements in §229.424(d) of this title (relating to Licensure Requirements), §229.425(c) and (d) of this title (relating to Licensing Procedures).

§229.424. Licensure Requirements.

(a) General. Except as provided in §229.423 of this title (relating to Exemptions), a person may not engage in the wholesale distribution of prescription drugs in Texas unless the person has a valid license from the commissioner of the department for each place of business.

(b) Out-of-state place of business.

(1) Except as provided by §229.423 of this title, a person who engages in the wholesale distribution of prescription drugs from outside this state may only engage in the wholesale distribution of prescription drugs in this state if the person holds a license as required in subsection (a) of this section.

(2) The department may accept reports from authorities in other jurisdictions to determine the extent of compliance with the Act and these sections.

(3) The department may issue a license to a person who engages in the wholesale distribution of prescription drugs outside this state to engage in the wholesale distribution of prescription drugs in this state if, after an examination of the reports of the person's compliance history and current compliance record, the department determines that the person is in compliance with the Act and these sections.

(4) The department shall consider each license application and any related documents or reports filed by or in connection with a person who wishes to engage in the wholesale distribution of prescription drugs in this state on an individual basis.

(c) Combination product. If the United States Food and Drug Administration determines, with respect to a product that is a combination of a prescription drug and a device, that the primary mode of action of the product is as a prescription drug, a wholesale distributor of such a product is subject to licensure as described in this section.

(d) Applicant qualifications. To qualify for the issuance or renewal of a wholesale distributor license under these sections, the designated representative of an applicant or license holder must:

(1) be at least 21 years of age;

(2) have been employed full-time for at least three years by a pharmacy or a wholesale distributor in a capacity related to the dispensing or distributing of prescription drugs, including recordkeeping for the dispensing or distributing of prescription drugs;

(3) be employed by the applicant full-time in a managerial-level position;

(4) be actively involved in and aware of the actual daily operation of the wholesale distributor;

(5) be physically present at the applicant's place of business during regular business hours, except when the absence of the designated representative is authorized, including sick leave and vacation leave;

(6) serve as a designated representative for only one applicant at any one time;

(7) not have been convicted of a violation of any federal, state, or local laws relating to wholesale or retail prescription drug distribution or the distribution of controlled substances; and

(8) not have been convicted of a felony under a federal, state, or local law.

(e) Display of license. The license shall be displayed in an open public area at each place of business.

(f) New place of business. Each person acquiring or establishing a place of business for the purpose of wholesale distribution of prescription drugs after the effective date of these sections shall apply to the department for a license of such business prior to beginning operation.

(g) Two or more places of business. If the wholesale distributor of prescription drugs operates more than one place of business, the wholesale distributor of prescription drugs shall license each place of business separately.

(h) Pre-licensing inspection. The applicant shall cooperate with any pre-licensing inspection by the department of the applicant's place of business.

(i) Issuance of license. In accordance with §229.281 of this title (relating to Processing License/Permit Applications Relating to Food and Drug Operations), the department may license a wholesale distributor of prescription drugs who meets the requirements of these sections, and pays all license fees in compliance with §229.427 of this title (relating to Licensure Fees).

(j) Transfer of license. Licenses shall not be transferable from one person to another or from one place of business to another.

(k) License term. Unless the license is amended as provided in subsection (m) of this section or suspended or revoked as provided in §229.428 of this title (relating to Refusal, Cancellation, Suspension, or Revocation of License), the license is valid for two years.

(l) Amendment of license. A license that is amended, including a change of name, ownership, or a notification of a change in the location of a licensed place of business will require submission of an application as outlined in §229.425 of this title (relating to Licensing Procedures) and submission of fees as outlined in §229.427 of this title.

(m) Renewal of license.

(1) The license application as outlined in §229.425 of this title and nonrefundable licensing fees as outlined in §229.427 of this title for each place of business shall be submitted to the department prior to the expiration date of the current license. A person who files a renewal application after the expiration date must pay an additional $100 as a delinquency fee.

(2) A licensee who fails to submit a renewal application prior to the current licensure expiration date and continues operations may be subject to the enforcement and penalty provisions in §229.430 of this title (relating to Enforcement and Penalties), and/or the refusal, cancellation, suspension and revocation provisions in §229.428 of this title.

(3) A renewal license shall only be issued when all past due license fees and delinquency fees are paid.

§229.425. Licensing Procedures.

(a) License application forms. License application forms may be obtained from the department, 1100 West 49th Street, Austin, Texas, 78756, or online at http://www.dshs.state.tx.us/license.shtm.

(b) Contents of license application. The application for licensure as a wholesale distributor of prescription drugs shall be signed and verified, submitted on a license application form furnished by the department, and contain the following information:

(1) all trade or business names under which the business is conducted;

(2) the address and telephone number of each place of business that is licensed;

(3) the type of business and the name, residence address, and valid driver's license number of:

(A) the proprietor, if the business is a proprietorship;

(B) all partners, if the business is a partnership; or

(C) all principals, if the business is an association;

(4) the date and place of incorporation, if the business is a corporation;

(5) the names and business addresses of the individuals in an administrative capacity showing:

(A) the managing proprietor, if the business is a proprietorship;

(B) the managing partner, if the business is a partnership;

(C) the officers and directors, if the business is a corporation; or

(D) the persons in a managerial capacity, if the business is an association;

(6) the name, date of birth, residence address, telephone number, and any information necessary to complete a criminal history record check on a designated representative of each place of business;

(7) the state of incorporation, if the business is a corporation;

(8) a list of all licenses and permits issued to the applicant by any other state under which the applicant is permitted to purchase or possess prescription drugs;

(9) the name of the manager for each place of business;

(10) a list of categories which must be marked and adhered to in the determination and paying of the fee; and

(11) a statement verified by the applicant's signature that acknowledges the applicant has read, understood, and agrees to abide by the provisions of these sections and those of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(c) Designated representatives and managers.

(1) For each person who is a designated representative and/or a manager of each place of business, the applicant shall provide the following to the department:

(A) the person's place(s) of residence for the past seven years;

(B) the person's date and place of birth;

(C) the person's occupations, positions of employment, and offices held during the past seven years;

(D) the business name and address of any business, corporation, or other organization in which the person held an office under subsection (b)(3) of this section or in which the person conducted an occupation or held a position of employment;

(E) a statement of whether during the preceding seven years the person was the subject of a proceeding to revoke a license and the nature and disposition of the proceeding;

(F) a statement of whether during the preceding seven years the person has been enjoined, either temporarily or permanently, by a court from violating any federal or state law regulating the possession, control, or distribution of prescription drugs, including the details concerning the event;

(G) a written description of any involvement by the person with any business, including any investments, other than the ownership of stock in a publicly traded company or mutual fund during the past seven years, that manufactured, administered, prescribed, distributed, or stored pharmaceutical products and any lawsuits in which the businesses were named as a party;

(H) a description of any felony offense for which the person, as an adult, was found guilty, regardless of whether adjudica-

tion of guilt was withheld or whether the person pled guilty or nolo contendere;

(I) a description of any criminal conviction of the person under appeal, a copy of the notice of appeal for that criminal offense, and a copy of the final written order of an appeal not later than the 15th day after the date of the appeal's disposition; and

(J) a photograph of the person taken not earlier than 30 days before the date the application was submitted.

(2) The information submitted under paragraph (1) of this subsection must be attested to under oath.

(d) Criminal history. The department will obtain an applicant's criminal history record information and may forward the fingerprints to the Federal Bureau of Investigation for a federal criminal history check.

(e) Renewal license application. The renewal application for licensure as a wholesale distributor of prescription drugs shall be made on a license application form furnished by the department.

(f) Texas Online. Applicants may submit initial and renewal license applications under these sections electronically by the Internet through Texas Online at www.texasonline.state.tx.us. The department is authorized to collect fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

§229.426. Report of Changes.

(a) Change in the content of a license application. The license holder shall notify the department in writing within ten days of any change which would render the information contained in the application for the license, reported pursuant to §229.425 of this title (relating to Licensing Procedures), no longer accurate. Failure to inform the department no later than ten days of a change in the information required in the application for a license may result in a suspension or revocation of the license.

(b) Change in location of place of business. Not fewer than 30 days in advance of the change, the licensee shall notify the department in writing of the licensee's intent to change the location of a licensed place of business. The notice shall include the address of the new location, and the name and residence address of the individual in charge of the business at the new location. Not more than 10 days after the completion of the change of location, the licensee shall notify the department in writing to confirm the completion of the change of location, and provide verification of the information previously provided or correct and confirm any information that has changed since providing the notice of intent. The notice and confirmation required by this subsection will be deemed adequate if the licensee sends the notices by certified mail, return receipt requested, to the department at 1100 West 49th Street, Austin, Texas 78756, or submits them electronically through the Texas Online Internet website.

§229.427. Licensure Fees.

(a) License fee. Except as provided by §229.423 of this title (relating to Exemptions), no person may operate or conduct business as a wholesale distributor of prescription drugs without first obtaining a license from the department. All applicants for an initial wholesale distributor of prescription drugs license or a renewal license shall pay a licensing fee unless otherwise exempt as provided by subsection (c) of this section. All fees are nonrefundable. Licenses are issued for two-year terms. A license shall only be issued when all past due license fees and delinquency fees are paid.

(1) In-state wholesale distributors of prescription drugs who are not manufacturers shall pay a two-year license fee based on the gross annual sales of all drugs.

(A) For a wholesale distributor of only compressed medical gases with gross annual drug sales of $0 - $20,000, the fees are:

(i) $675 for a two-year license;

(ii) $675 for a two-year license that is amended due to a change of ownership; and

(iii) $337 for a license that is amended during the current licensure period due to minor changes.

(B) For a wholesale distributor with gross annual drug sales of $0 - $199,999.99, the fees are:

(i) $1,080 for a two-year license;

(ii) $1,080 for a two-year license that is amended due to a change of ownership; and

(iii) $540 for a license that is amended during the current licensure period due to minor changes.

(C) For a wholesale distributor with gross annual drug sales of $200,000 - $19,999,999.99, the fees are:

(i) $1,755 for a two-year license;

(ii) $1,755 for a two-year license that is amended due to a change of ownership; and

(iii) $877 for a license that is amended during the current licensure period due to minor changes.

(D) For a wholesale distributor with gross annual drug sales greater than or equal to $20 million, the fees are:

(i) $2,295 for a two-year license;

(ii) $2,295 for a two-year license that is amended due to a change of ownership; and

(iii) $1,147 for a license that is amended during the current licensure period due to minor changes.

(2) In-state wholesale distributors of only compressed medical gases who are not manufacturers and who also are required to be licensed as a device distributor under §229.439(a) of this title (relating to Licensure Fees) or as a wholesale food distributor under §229.182(a)(3) of this title (relating to Licensing/Registration Fee and Procedures) shall pay a combined two-year license fee for each place of business. License fees are based on the combined gross annual sales of these regulated products (foods, drugs, and/or devices).

(A) For a wholesale distributor with combined gross annual sales of $0 - $199,999.99, the fees are:

(i) $540 for a two-year license;

(ii) $540 for a two-year license that is amended due to a change of ownership; and

(iii) $270 for a license that is amended during the current licensure period due to minor changes.

(B) For a wholesale distributor with combined gross annual sales of $200,000 - $499,999.99, the fees are:

(i) $810 for a two-year license;

(ii) $810 for a two-year license that is amended due to a change of ownership; and

(iii) $405 for a license that is amended during the current licensure period due to minor changes.

(C) For a wholesale distributor with combined gross annual sales of $500,000 - $999,999.99, the fees are:

(i) $1,080 for a two-year license;

(ii) $1,080 for a two-year license that is amended due to a change of ownership; and

(iii) $540 for a license that is amended during the current licensure period due to minor changes.

(D) For a wholesale distributor with combined gross annual sales of $1 million - $9,999,999.99, the fees are:

(i) $1,350 for a two-year license;

(ii) $1,350 for a two-year license that is amended due to a change of ownership; and

(iii) $675 for a license that is amended during the current licensure period due to minor changes.

(E) For a wholesale distributor with combined gross annual sales greater than or equal to $10 million, the fees are:

(i) $2,025 for a two-year license;

(ii) $2,025 for a two-year license that is amended due to a change of ownership; and

(iii) $1,012 for a license that is amended during the current licensure period due to minor changes.

(3) In-state wholesale distributors of prescription drugs who are manufacturers shall pay a two-year license fee based on the gross annual sales of all drugs.

(A) For a wholesale distributor with gross annual drug sales of $0 - $199,999.99, the fees are:

(i) $1,080 for a two-year license;

(ii) $1,080 for a two-year license that is amended due to a change of ownership; and

(iii) $540 for a license that is amended during the current licensure period due to minor changes.

(B) For a wholesale distributor with gross annual drug sales of $200,000 - $19,999,999.99, the fees are:

(i) $1,755 for a two-year license;

(ii) $1,755 for a two-year license that is amended due to a change of ownership; and

(iii) $877 for a license that is amended during the current licensure period due to minor changes.

(C) For a wholesale distributor with gross annual drug sales greater than or equal to $20 million, the fees are:

(i) $2,295 for a two-year license;

(ii) $2,295 for a two-year license that is amended due to a change of ownership; and

(iii) $1,147 for a license that is amended during the current licensure period due to minor changes.

(4) Out-of-state wholesale distributors of prescription drugs shall pay a two-year license fee based on all gross annual sales of drugs delivered into Texas.

(A) For each wholesale distributor with gross annual drug sales of $0 - $19,999,999, the fees are:

(i) $1,350 for a two-year license;

(ii) $1,350 for a two-year license that is amended due to a change of ownership; and

(iii) $675 for a license that is amended during the current licensure period due to minor changes.

(B) For each wholesale distributor with gross annual drug sales of greater than or equal to $20 million, the fees are:

(i) $2,025 for a two-year license;

(ii) $2,025 for a two-year license that is amended due to a change of ownership; and

(iii) $1,012 for a license that is amended during the current licensure period due to minor changes.

(b) Proration of license fees. A person that has more than one place of business may request a one-time proration of the license fees when applying for a license for each new place of business. Upon approval by the department, the license for the new place of business will have a renewal date that is the same as the firm's other licensed places of business.

(c) Exemption from license fees. A person is exempt from the license fees required by this section if the person is a charitable organization, as described in the Internal Revenue Code of 1986, §501(c)(3), or a nonprofit affiliate of the organization, to the extent otherwise permitted by law.

§229.428. Refusal, Cancellation, Suspension or Revocation of License.

(a) The commissioner may refuse an application for a wholesale distributor of prescription drugs license or may suspend or revoke such a license if the applicant or licensee:

(1) has been convicted of a felony or misdemeanor that involves moral turpitude;

(2) is an association, partnership, or corporation and the managing officer and/or any officer or director of a corporation has been convicted of a felony or misdemeanor that involves moral turpitude;

(3) is an association, partnership, or corporation and the managing officer and/or any officer or director of a corporation has been convicted of a felony or misdemeanor involving the illegal use, sale, or transportation of intoxicating liquors, narcotic drugs, barbiturates, amphetamines, desoxyephedrine, their compounds or derivatives, or any other dangerous or habit-forming drugs;

(4) has violated any of the provisions of the Texas, Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431 (Act) or these sections;

(5) has violated the Health and Safety Code, §431.021(l)(3), concerning the counterfeiting of a drug or the sale or holding for sale of a counterfeit drug;

(6) has violated the Texas Controlled Substances Act, Health and Safety Code, Chapter 481, or the Texas Dangerous Drug Act, Health and Safety Code, Chapter 483;

(7) has violated the rules of the director of the Department of Public Safety, including being responsible for a significant discrepancy in the records that state law requires the applicant or licensee to maintain;

(8) fails to complete a license application or submits an application that contains false, misleading, or incorrect information or contains information that cannot be verified by the department;

(9) has failed to pay a license fee or a renewal fee for a license; or

(10) has obtained or attempted to obtain a license by fraud or deception.

(b) The department may, after providing opportunity for hearing, refuse to license a wholesale distributor of prescription drugs, or may suspend or revoke a license for violations of the requirements in these sections or for any of the reasons described in the Act.

(c) Any hearings for the refusal, suspension, or revocation of a license are governed by §§1.21, 1.23, 1.25, and 1.27 of this title (relating to Formal Hearing Procedures).

(d) If the department suspends a license, the suspension shall remain in effect until the department determines that the reason for the suspension no longer exists. If the suspension overlaps a renewal date, the suspended license holder shall comply with the renewal procedures in §229.425 of this title (relating to Licensing Procedures); however, the department may choose not to renew the license until the department determines that the reason for suspension no longer exists.

(e) If the department revokes or does not renew a license, a person may reapply for a license by complying with the requirements and procedures in §229.425 of this title at the time of reapplication. The department may refuse to issue a license if the reason for revocation or non-renewal continues to exist.

(f) A license issued under these sections shall be returned to the department if the person's place of business:

(1) ceases business or otherwise ceases operation on a permanent basis;

(2) relocates; or

(3) changes name or ownership. For a corporation, an ownership change is deemed to have occurred, resulting in the necessity to return the license to the department, when 5.0% or more of the share of stock of a corporation is transferred from one person to another.

§229.429. Minimum Standards for Licensure.

(a) General requirements. All persons engaged in the wholesale distribution of prescription drugs must comply with the applicable minimum standards in this section, in addition to the statutory requirements contained in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431 (Act) and those requirements in §229.420 of this title (relating to Applicable Laws and Regulations). For the purpose of this section, the policies described in the United States Food and Drug Administration's (FDA's) Compliance Policy Guides as they apply to prescription drugs shall be the policies of the department.

(b) Federal establishment registration and drug listing. All persons who operate as prescription drug manufacturers in Texas shall meet the requirements in 21 Code of Federal Regulations (CFR), Part 207, titled "Registration of Producers of Drugs and Listing of Drugs in Commercial Distribution." New prescription drugs offered for sale by wholesale distributors shall have met, if applicable, the requirements of 21 CFR, Part 314, titled "Applications for FDA Approval to Market a New Drug."

(c) Good manufacturing practices. Manufacturers of prescription drug products shall be in compliance with the applicable requirements in 21 CFR, Part 210, titled "Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding of Drugs"; 21 CFR, Part 211, titled "Current Good Manufacturing Practice for Finished Pharmaceuticals; General"; 21 CFR, Part 225, titled "Current Good Manufacturing Practice for Medicated Feeds"; and 21 CFR, Part 226, titled "Current Good Manufacturing Practice for Type A Medicated Articles." The regulations in these parts govern the methods used in, and the facilities or controls used for, the manufacture, processing, packing, or holding of a drug to assure that each drug meets the requirements of the Federal Act as to safety, and has the identity and strength and meets the quality and purity characteristics that it purports or is represented to possess.

(d) Buildings and facilities.

(1) All manufacturing, processing, packing, or holding of drugs by prescription drug manufacturers shall take place in buildings and facilities described in subsection (c) of this section.

(2) No manufacturing, processing, packing, or holding of prescription drugs shall be conducted in any personal residence.

(3) No sale of prescription drugs shall be conducted in any flea market.

(4) Any place of business used by a wholesale distributor of prescription drugs who is not a manufacturer to store, warehouse, hold, offer, transport, or display drugs shall:

(A) be in compliance with the requirements adopted in §229.420(a)(14) of this title;

(B) be of suitable size and construction to facilitate cleaning, maintenance, and proper operations;

(C) have storage areas designed to provide adequate lighting, ventilation, temperature, sanitation, humidity, and space;

(D) be maintained in a clean and orderly condition;

(E) be free from infestation by insects, rodents, birds, or vermin of any kind; and

(F) have a quarantine area for storage of drugs that are outdated, damaged, deteriorated, misbranded, or adulterated.

(e) Storage of prescription drugs. All prescription drugs stored by wholesale distributors shall be held at appropriate temperatures and under appropriate conditions in accordance with requirements, if any, in the labeling of such drugs.

(f) Minimum restrictions on transactions.

(1) Returns. A wholesale distributor shall receive prescription drug returns or exchanges from a pharmacy or chain pharmacy warehouse in accordance with the terms and conditions of the agreement between the wholesale distributor and the pharmacy or chain pharmacy warehouse. The returns or exchanges received by the wholesale distributor as provided by this subsection are not subject to the pedigree requirement under §431.412 of the Act. In connection with the returned goods process, a wholesale distributor shall establish appropriate business practices and exercise due diligence designed to prevent the entry of adulterated or counterfeit drugs into the distribution channel.

(2) Distributions. A manufacturer or wholesale distributor may distribute prescription drugs only to a person licensed under this subchapter, or the appropriate state licensing authorities, if an out-of-state wholesaler or retailer, or authorized by federal law to receive the drug. Before furnishing prescription drugs to a person not known to the manufacturer or wholesale distributor, the manufacturer or wholesale distributor must verify that the person is legally authorized by the department or the appropriate state licensing authority to

receive the prescription drugs or authorized by federal law to receive the drugs.

(3) Premises. Prescription drugs distributed by a manufacturer or wholesale distributor may be delivered only to the premises listed on the license, except as listed in paragraph (4) of this subsection. A manufacturer or wholesale distributor may distribute prescription drugs to an authorized person or agent of that person at the premises of the manufacturer or wholesale distributor if:

(A) the identity and authorization of the recipient is properly established; and

(B) delivery is made only to meet the immediate needs of a particular patient of the authorized person.

(4) Delivery to hospital pharmacies. Prescription drugs may be distributed to a hospital pharmacy receiving area if a pharmacist or an authorized receiving person signs, at the time of delivery, a receipt showing the type and quantity of the prescription drug received. Any discrepancy between the receipt and the type and quantity of the prescription drug actually received shall be reported to the delivering manufacturer or wholesale distributor not later than the next business day after the date of delivery to the pharmacy receiving area.

(g) Prescription drug labeling. Prescription drugs sold by wholesale distributors shall meet the labeling requirements of the Act and those adopted in §229.420(a) of this title.

(h) Prescription drugs that are combination products. Any prescription drug that is a combination product as described in §229.424(c) of this title (relating to Licensure Requirements) is also subject to the applicable requirements in Subchapter X of this chapter (relating to Licensing of Device Distributors and Manufacturers).

(i) Prescription drugs that are also cosmetics. Any prescription drug that is also a cosmetic or component thereof is also subject to the applicable requirements of Subchapter D of this chapter (relating to Regulation of Cosmetics).

(j) Nonprescription drugs. Nonprescription drugs offered for sale by wholesale distributors of prescription drugs shall be in compliance with the applicable requirements of Subchapter O of this chapter (relating to Licensing of Wholesale Distributors of Nonprescription Drugs--Including Good Manufacturing Practices).

§229.430. Enforcement and Penalties.

(a) Inspection.

(1) To enforce these sections or the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431 (Act), the commissioner, an authorized agent, or a health authority may, on presenting appropriate credentials to the owner, operator, or agent in charge of a place of business:

(A) enter at reasonable times a place of business, including a factory or warehouse, in which a prescription drug is manufactured, packed, or held for introduction into commerce or held after the introduction;

(B) enter a vehicle being used to transport or hold a prescription drug in commerce; or

(C) inspect at reasonable times, within reasonable limits, and in a reasonable manner, the place of business or vehicle and all equipment, finished and unfinished materials, containers, and labeling of any item and obtain samples necessary for the enforcement of these sections or the Act.

(2) The inspection of a place of business, including a factory, warehouse, or consulting laboratory, in which a prescription drug is manufactured, processed, packed, or held for introduction into commerce extends to any place or thing, including a record, file, paper, process, control, or facility, in order to determine whether the drug:

(A) is adulterated or misbranded;

(B) may not be manufactured, introduced into commerce, sold, or offered for sale under the Act; or

(C) is otherwise in violation of these sections or the Act.

(3) An inspection under paragraph (2) of this subsection may not extend to:

(A) financial data;

(B) sales data other than shipment data;

(C) pricing data;

(D) personnel data other than data relating to the qualifications of technical and professional personnel performing functions under the Act;

(E) research data other than data:

(i) relating to new drugs and antibiotic drugs; and

(ii) subject to reporting and inspection under regulations issued under §505(i) or (j) of the Federal Act; or

(F) data relating to other drugs that, in the case of a new drug, would be subject to reporting or inspection under regulations issued under §505(j) of the Federal Act.

(4) An inspection under paragraph (2) of this subsection shall be started and completed with reasonable promptness.

(b) Receipt for samples. An authorized agent or health authority who makes an inspection of a place of business, including a factory or warehouse, and obtains a sample during or on completion of the inspection and before leaving the place of business, shall give to the owner, operator, or the owner's or operator's agent a receipt describing the sample.

(c) Access to records.

(1) A person who is required to maintain records referenced in these sections or under the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431 (Act) or Chapter V of the Federal Food, Drug, and Cosmetic Act (Federal Act) or a person who is in charge or custody of those records shall, at the request of an authorized agent or health authority, permit the authorized agent or health authority at all reasonable times access to and to copy and verify the records.

(2) A person, including a carrier engaged in commerce, or other person receiving a prescription drug in commerce or holding a prescription drug received in commerce shall, at the request of an authorized agent, permit the authorized agent at all reasonable times to have access to and to copy and verify all records showing:

(A) the movement in commerce of any prescription drug;

(B) the holding of any prescription drug after movement in commerce; and

(C) the quantity, shipper, and consignee of any prescription drug.

(d) Retention of records. Records required by these sections shall be maintained at the place of business or other location that is reasonably accessible for a period of at least three years following disposition of the prescription drug unless a greater period of time is required

by laws and regulations adopted in §229.420 of this title (relating to Applicable Laws and Regulations).

(e) Adulterated or misbranded prescription drug. If the department identifies an adulterated or misbranded prescription drug, the department may impose the applicable enforcement provisions of subchapter C of the Act including, but not limited to: detention, emergency order, recall, condemnation, destruction, injunction, civil penalties, criminal penalties, and/or administrative penalties. Administrative and civil penalties will be assessed using the Severity Levels contained in §229.251 of this title (relating to Minimum Standards for Licensure).

(f) Order to cease distribution.

(1) The commissioner shall issue an order requiring a person, including a manufacturer, distributor, or retailer of a prescription drug, to immediately cease distribution of the drug if the commissioner determines there is a reasonable probability that:

(A) a wholesale distributor has:

(i) violated these sections or the Act;

(ii) falsified a pedigree; or

(iii) sold, distributed, transferred, manufactured, repackaged, handled, or held a counterfeit prescription drug intended for human use that could cause serious adverse health consequences or death; and

(B) other procedures would result in unreasonable delay.

(2) An order under this subsection must provide the person subject to the order with an opportunity for an informal hearing on the actions required by the order to be held not later than the 10th day after the date of issuance of the order.

(3) If, after providing an opportunity for a hearing, the commissioner determines that inadequate grounds exist to support the actions required by the order, the commissioner shall vacate the order.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603577
Cathy Campbell
General Counsel
Department of State Health Services
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§115.10, 115.119, 115.129, 115.139, 115.149, 115.219, 115.239, 115.319, 115.359, 115.419, 115.439, 115.449, 115.519, and 115.539.

These amended sections and corresponding revisions to the state implementation plan (SIP) will be submitted to the United States Environmental Protection Agency (EPA).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The Federal Clean Air Act (FCAA) Amendments of 1990 as codified in 42 United States Code (USC), §§7401 *et seq*. require EPA to set national ambient air quality standards (NAAQS) to ensure public health, and to designate areas as either in attainment or nonattainment with the NAAQS, or as unclassifiable. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Each state is required to submit a SIP to the EPA that provides for attainment and maintenance of the NAAQS.

The Dallas-Fort Worth area, consisting of four counties (Collin, Dallas, Denton, and Tarrant), was designated nonattainment and classified as moderate for the one-hour ozone NAAQS in accordance with the 1990 FCAA Amendments, and was required to attain the one-hour ozone NAAQS by November 15, 1996. A SIP was submitted based on a volatile organic compound (VOC) reduction strategy, but the Dallas-Fort Worth area did not attain the NAAQS by the mandated deadline. Consequently, in 1998 the EPA reclassified the Dallas-Fort Worth area from "moderate" to "serious," resulting in a requirement to submit an additional SIP revision demonstrating attainment by the new deadline of November 15, 1999.

The Dallas-Fort Worth area also failed to reach attainment by the November 15, 1999, deadline. In the attainment demonstration SIP revision adopted by the commission in April 2000, the importance of local nitrogen oxides (NO_x) reductions as well as the transport of ozone and its precursors from the Houston-Galveston-Brazoria ozone nonattainment area (HGB area) were considered. Based on photochemical modeling demonstrating transport from the HGB area, the agency requested an extension of the Dallas-Fort Worth area attainment date to November 15, 2007, the same attainment date as for the HGB area, in accordance with an EPA policy allowing extension of attainment dates due to transport of pollutants from other areas.

The EPA transport policy was later overturned by three federal courts, including the Court of Appeals for the 5th Circuit, which ruled in *Sierra Club et. al v. EPA*, 314 F. 3d 735 (2002), that EPA did not have authority to extend an area's attainment date based on transport. Although the Dallas-Fort Worth area was not the specific subject of any of these suits, the Dallas-Fort Worth area one-hour ozone attainment demonstration SIP, including an extended attainment date, was not approvable by EPA.

On July 18, 1997, EPA promulgated a revised ozone standard (the eight-hour ozone NAAQS) (62 FR 38856). The eight-hour ozone NAAQS was challenged by numerous litigants and ultimately upheld by the United States Supreme Court in February 2001. On April 30, 2004, EPA promulgated the first phase of the implementation rules for the eight-hour ozone NAAQS (Phase I Implementation Rule) (69 FR 23951). Also on April 30, 2004, the Dallas-Fort Worth area was designated as nonattainment and classified as moderate for the eight-hour ozone NAAQS. Five additional counties (Ellis, Johnson, Kaufman, Parker, and Rockwall) were added to the Dallas-Fort Worth eight-hour ozone nonattainment area (DFW area). Effective June 15, 2004, the DFW area consists of nine counties (Collin, Dallas, Denton, El-

lis, Johnson, Kaufman, Parker, Rockwall, and Tarrant) that are nonattainment for the eight-hour ozone NAAQS. The DFW area must attain the eight-hour ozone NAAQS by June 15, 2010.

EPA's Phase I Implementation Rule provided three options for eight-hour ozone nonattainment areas that do not have an approved one-hour ozone attainment SIP: 1) submit a one-hour ozone attainment demonstration no later than one year after the effective date of the eight-hour ozone designation (June 15, 2005); 2) submit an eight-hour ozone attainment demonstration no later than one year after the effective date of the eight-hour ozone designation, which is June 15, 2005, that provides for a 5% increment of progress (IOP) emission reduction from the area's 2002 emissions baseline that is in addition to federal and state measures already approved by EPA, and to achieve these reductions by June 15, 2007; or 3) submit an eight-hour ozone attainment demonstration by June 15, 2005. Options one and three required successful photochemical grid modeling performance. Based on poor model performance, the commission, in consultation with EPA, determined that option two was the most expeditious approach to achieve the emission reductions ultimately needed to meet the June 15, 2005, transportation conformity deadline and attain the eight-hour ozone NAAQS by June 15, 2010. Therefore, the commission adopted a 5% IOP Plan in April 2005 and submitted it to EPA.

On November 29, 2005, EPA subsequently finalized its Phase II Implementation Rule for the eight-hour ozone NAAQS (Phase II Implementation Rule) (70 FR 71612). The Phase II Implementation Rule provides guidance and requirements for the remaining elements of the program to implement the eight-hour ozone NAAQS.

FCCA, §182(b)(2)(C), requires that reasonably available control technology (RACT) be implemented in nonattainment areas designated as moderate and above for the ozone NAAQS. The purpose of this rulemaking is to implement RACT controls for VOC emission sources in the five newly designated nonattainment counties. RACT for NO_x emission sources will be addressed, if necessary, in other rulemaking actions.

The proposed rulemaking would subject owners or operators of certain VOC-emitting facilities located in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties to the same control, monitoring, testing, recordkeeping, and reporting requirements to which owners or operators of facilities in the other four counties in the DFW nonattainment area are subject. The definition of "Dallas/Fort Worth area" in §115.10 would be amended to include the five additional counties. The definition of "Covered attainment counties" would also be amended to remove these five counties. Compliance dates would be added to specify when the owners or operators of newly affected facilities must achieve compliance with the requirements. The EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701) requires the implementation of RACT as expeditiously as practicable, but no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard. Since the five additional counties were designated on June 15, 2004, the required compliance date for RACT is March 1, 2009.

Rules in Subchapter C, Volatile Organic Compound Transfer Operations, Division 2, Filling of Gasoline Storage Vessels (Stage I) for Motor Vehicle Fuel Dispensing Facilities and Subchapter E, Solvent-Using Processes, Division 2, Surface Coating Processes, were made applicable to the additional counties as part of the 5% IOP SIP adopted on April 27, 2005, and are not part of this proposed rulemaking. Rules in Subchapter B, General Volatile Organic Compound Sources, Division 5, Municipal Solid Waste Landfills, are not part of this rulemaking because information in permit and emission inventory files indicates that no existing municipal solid waste landfills in Ellis, Johnson, Kaufman, Parker, or Rockwall Counties would be subject to the control requirements in this division. Rules in Subchapter C, Volatile Organic Compound Transfer Operations, Division 4, Control of Vehicle Refueling Emissions (Stage II) at Motor Vehicle Fuel Dispensing Facilities, are not part of this proposed rulemaking because of the decreased cost-effectiveness of these controls with the increased market penetration of motor vehicles equipped with on-board refueling vapor recovery. The Stage II rules continue to apply to the four-county one-hour ozone nonattainment area.

SECTION BY SECTION DISCUSSION

Grammatical, style, and other non-substantive corrections are made throughout the rulemaking to be consistent with Texas Register requirements, to improve readability, and to conform to the drafting standards in the *Texas Legislative Council Drafting Manual*, November 2004.

Subchapter A, Definitions

The proposed amendment to §115.10 would revise the definitions of "Covered attainment counties" and "Dallas/Fort Worth area" by moving Ellis, Johnson, Kaufman, Parker, and Rockwall Counties from the "Covered attainment counties" definition to the "Dallas/Fort Worth area" definition. The current definitions include these counties as part of the "Dallas/Fort Worth area" definition only for the purposes of Subchapter C, Division 2, and Subchapter E, Division 2. The proposed amendment would include the five counties as part of the "Dallas/Fort Worth area" definition for all sections of Chapter 115, except Subchapter B, Division 5. Information in permit and emission inventory files indicates that no existing municipal solid waste landfills in Ellis, Johnson, Kaufman, Parker, or Rockwall Counties would be subject to the control requirements in this division. Any new landfills would be subject to federal control requirements. For these reasons, no emission reductions would be expected from extension of the landfill control requirements to the five counties. Therefore, applying the requirements to the five counties is not required for RACT.

Subchapter B, General Volatile Organic Compound Sources

Division 1, Storage of Volatile Organic Compounds

The proposed amendment to §115.119, Counties and Compliance Schedule, would delete language in subsections (a) and (b) that is no longer needed due to the passing of the specified compliance dates. Subsection (a) would be changed to specify that the owner or operator of each stationary tank, reservoir, or other container in which any VOC is placed, stored, or held shall continue to comply with the division as required by §115.930. Subsection (b) would be changed to specify that the owner or operator of each stationary tank, reservoir, or other container in which any VOC is placed, stored, or held in Ellis, Johnson, Kaufman, Parker, or Rockwall County shall comply with the applicable requirements as soon as practicable, but no later than March 1, 2009. This change is necessary to ensure that RACT requirements for control of VOC emissions in these five counties are implemented no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard, as specified in the EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701).

Division 2, Vent Gas Control

The proposed amendment to §115.129, Counties and Compliance Schedule, would add subsection (d) to specify that the owner or operator of each vent gas stream in Ellis, Johnson, Kaufman, Parker, or Rockwall County shall comply with the applicable requirements as soon as practicable, but no later than March 1, 2009. This change is necessary to ensure that RACT requirements for control of VOC emissions in these five counties are implemented no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard, as specified in the EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701).

Division 3, Water Separation

The proposed amendment to §115.139, Counties and Compliance Schedule, would designate the existing language as subsection (a) and add subsection (b) to specify that the owner or operator of each VOC water separator in Ellis, Johnson, Kaufman, Parker, or Rockwall County shall comply with the applicable requirements as soon as practicable, but no later than March 1, 2009. This change is necessary to ensure that RACT requirements for control of VOC emissions in these five counties are implemented no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard, as specified in the EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701).

Division 4, Industrial Wastewater

The proposed amendment to §115.149, Counties and Compliance Schedule, would delete language in subsections (a) - (g) that is no longer needed due to the passing of the specified compliance dates. Subsection (a) would be changed to specify that the owner or operator of each affected source category within a plant in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Hardin, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties shall continue to comply with the division as required by §115.930. Subsection (b) would be changed to specify that the owner or operator of each affected source category within a plant in Ellis, Johnson, Kaufman, Parker, or Rockwall County shall comply with the applicable requirements as soon as practicable, but no later than March 1, 2009. This change is necessary to ensure that RACT requirements for control of VOC emissions in these five counties are implemented no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard, as specified in the EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701).

Subchapter C, Volatile Organic Compound Transfer Operations

Division 1, Loading and Unloading of Volatile Organic Compounds

The proposed amendment to §115.219, Counties and Compliance Schedule, would add subsection (d) to specify that the owner or operator of each VOC transfer operation in Ellis, Johnson, Kaufman, Parker, or Rockwall County shall comply with the applicable requirements as soon as practicable, but no later than March 1, 2009. This change is necessary to ensure that RACT requirements for control of VOC emissions in these five counties are implemented no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard, as specified in the EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701). Because gasoline terminals and gasoline bulk plants in Ellis, Johnson, Kaufman, Parker, or Rockwall Counties are already subject to control requirements specified for covered attainment counties, the proposed rule would also specify that owners or operators of gasoline terminals and gasoline bulk plants shall continue to comply with those requirements until the facility achieves compliance with the newly applicable requirements.

Division 3, Control of Volatile Organic Compound Leaks from Transport Vessels

The proposed amendment to §115.239, Counties and Compliance Schedule, would add subsection (c) to specify that the owner or operator of each tank-truck tank in Ellis, Johnson, Kaufman, Parker, or Rockwall County shall comply with the applicable requirements as soon as practicable, but no later than March 1, 2009. This change is necessary to ensure that RACT requirements for control of VOC emissions in these five counties are implemented no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard, as specified in the EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701). Because gasoline tank-truck tanks in Ellis, Johnson, Kaufman, Parker, or Rockwall Counties are already subject to control requirements specified for covered attainment counties, the proposed rule would also specify that owners or operators of gasoline tank-truck tanks shall continue to comply with those requirements until the facility achieves compliance with the newly applicable requirements.

Subchapter D, Petroleum Refining, Natural Gas Processing, and Petrochemical Processes

Division 1, Process Unit Turnaround and Vacuum-Producing Systems in Petroleum Refineries

The proposed amendment to §115.319, Counties and Compliance Schedule, would designate the existing language as subsection (a) and add subsection (b) to specify that the owner or operator of each affected source in Ellis, Johnson, Kaufman, Parker, or Rockwall County shall comply with the applicable requirements as soon as practicable, but no later than March 1, 2009. This change is necessary to ensure that RACT requirements for control of VOC emissions in these five counties are implemented no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard, as specified in the EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701).

Division 3, Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas

The proposed amendment to §115.359, Counties and Compliance Schedule, would delete language in paragraphs (2) and (3) that is no longer needed due to the passing of the specified compliance dates. The remaining existing language and the language in paragraph (1) would be designated as subsection (a). Subsection (b) would be added to specify that the owner or operator of each affected source in Ellis, Johnson, Kaufman, Parker, or Rockwall County shall comply with the applicable requirements as soon as practicable, but no later than March 1, 2009. This change is necessary to ensure that RACT requirements for control of VOC emissions in these five counties are implemented no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard, as specified in the EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701).

Subchapter E, Solvent-Using Processes

Division 1, Degreasing Processes

The proposed amendment to §115.419, Counties and Compliance Schedule, would add subsection (c) to specify that all affected persons in Ellis, Johnson, Kaufman, Parker, or Rockwall County shall comply with the applicable requirements as soon as practicable, but no later than March 1, 2009. This change is necessary to ensure that RACT requirements for control of VOC emissions in these five counties are implemented no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard, as specified in the EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701).

Division 3, Flexographic and Rotogravure Printing

The proposed amendment to §115.439, Counties and Compliance Schedule, would designate the existing language as subsection (a) and add subsection (b) to specify that all affected persons in Ellis, Johnson, Kaufman, Parker, or Rockwall County shall comply with the applicable requirements as soon as practicable, but no later than March 1, 2009. This change is necessary to ensure that RACT requirements for control of VOC emissions in these five counties are implemented no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard, as specified in the EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701).

Division 4, Offset Lithographic Printing

The proposed amendment to §115.449, Counties and Compliance Schedule, would add subsection (f) to specify that the owner or operator of all offset lithographic printing presses on a property that, when uncontrolled, emit a combined weight of VOC equal to or greater than 50 tons per calendar year in Ellis, Johnson, Kaufman, Parker, or Rockwall County shall comply with the applicable requirements as soon as practicable, but no later than March 1, 2009. This change is necessary to ensure that RACT requirements for control of VOC emissions in these five counties are implemented no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard, as specified in the EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701).

Subchapter F, Miscellaneous Industrial Sources

Division 1, Cutback Asphalt

The proposed amendment to §115.519, Counties and Compliance Schedule, would add subsection (c) to specify that all affected persons in Ellis, Johnson, Kaufman, Parker, or Rockwall County shall comply with the applicable requirements as soon as practicable, but no later than March 1, 2009. This change is necessary to ensure that RACT requirements for control of VOC emissions in these five counties are implemented no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard, as specified in the EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701).

Division 2, Pharmaceutical Manufacturing Facilities

The proposed amendment to §115.539, Counties and Compliance Schedule, would designate the existing language as subsection (a) and add subsection (b) to specify that the owner or operator of each affected pharmaceutical manufacturing facility in Ellis, Johnson, Kaufman, Parker, or Rockwall County shall comply with the applicable requirements as soon as practicable, but no later than March 1, 2009. This change is necessary to ensure that RACT requirements for control of VOC emissions in these five counties are implemented no later than the first ozone season (or portion of) that occurs 57 months after designation for the eight-hour ozone standard, as specified in the EPA eight-hour ozone Phase II Implementation Rule (70 FR 71701).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed rules are one part of a control strategy designed for the DFW area to reduce VOC air emissions and attain the eight-hour ozone NAAQS mandated by EPA. The proposed rules would amend requirements of mature regulatory programs by extending their coverage areas to five additional counties. Governmental entities may be affected by additional limitations on the use of cutback asphalt for paving activities, but since alternative materials are available at comparable prices, they are not expected to see an increase in costs. If a governmental entity in the affected area has VOC wastewater streams at a waste facility, the proposed rules could have fiscal implications for that entity.

The proposed rules would subject the owners or operators of certain VOC-emitting facilities located in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties to the same control, monitoring, testing, recordkeeping, and reporting requirements to which owners or operators of facilities in the other four counties in the DFW nonattainment area are subject by amending emission reduction requirements in Chapter 115, Subchapters B - F. These requirements are one component of the DFW attainment demonstration SIP that Texas shall submit to the EPA. Owners or operators of facilities addressed by the proposed rules would have to comply with the proposed requirements no later than March 1, 2009; the deadline required by EPA for major air emission sources to comply with RACT in these counties.

The proposed rules in Subchapter B, Division 4, would apply emission specifications and control, monitoring, and recordkeeping requirements to owners or operators of affected VOC wastewater streams. The rules would only affect facilities in the following source categories: organic chemicals, plastics, and synthetic fibers manufacturing industry under Standard Industrial Classification (SIC) codes 2821, 2823, 2824, 2865, and 2869; pesticides manufacturing industry under SIC code 2879; petroleum refining industry under SIC code 2911; pharmaceutical manufacturing industry under SIC codes 2833, 2834, and 2836; and hazardous waste treatment, storage, and disposal facilities industry under SIC codes 4952, 4953, and 4959. Only one regulated entity is known to operate in the five counties in any of these SIC codes (4953). This regulated entity is a municipal solid waste landfill that may not have affected VOC wastewater streams. The specifications for determining whether a wastewater stream is affected are complex. Methods and control costs for wastewater streams would vary widely depending on the flow rate of the stream and on the type and concentration of VOC.

The proposed rules in Subchapter F, Division 1, would require users and sellers of cutback asphalt containing VOC to limit its sale and use when paving roads, driveways, and parking lots. This rule would affect state, municipal, or county governmental entities that use or specify the type of asphalt application. The

commission does not anticipate any increase in cost to private or governmental entities from limiting the use of cutback asphalt because alternative materials are available at comparable prices.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with the Clean Air Act and a reduction in VOC emissions in the DFW nonattainment area.

The proposed rules in Subchapter B, Division 1, would apply to owners or operators of stationary tanks, reservoirs, or other containers in which any VOC is placed, stored, or held. The owners or operators of a storage vessel shall meet certain equipment specifications or control requirements along with inspection and recordkeeping requirements. Baseline data from regulated entities required to report emissions indicates that approximately 35 tanks may be affected by the requirements. Additional tanks may also be affected at regulated entities that have not been previously required to report emissions. The actual costs of the proposed rules would depend on the properties of the material stored and the type of equipment used to meet the control requirements, but based on available data, costs could be as much as $50,000 per control unit, $15,000 per organic compound monitoring unit, and $200 per seal inspection.

The proposed rules in Subchapter B, Division 2, would apply emission specifications and control, monitoring, and recordkeeping requirements to owners or operators of vent gas streams containing VOC. Affected vent gas streams could come from a variety of different processes, including commercial bakeries, so an estimate of the number of affected facilities is not available. The proposed rules would not apply to vent gas streams that are specifically regulated by another division in Chapter 115 (such as surface coating or printing) nor to combustion unit exhaust streams (unless the combustion unit is used as a control device for an affected vent gas stream). The proposed rules would apply to commercial bakeries if the total weight of uncontrolled VOC emitted from all bakery ovens on the property is greater than or equal to 50 tons per year. Reported baseline data indicates there are four bakeries located in the five counties affected by the proposed rule. Using available data, estimated costs to install a catalytic incinerator to control emissions from bakery ovens would be in the range of $150,000 to $300,000, with annual operational costs of $15,000 to $35,000. Available estimated costs of a control device to abate emissions from a vent stream are $600,000 for capital equipment and $360,000 for annual operational costs. Actual control costs would depend on the size, VOC concentration, and other characteristics of the specific vent stream to be controlled.

The proposed rules in Subchapter B, Division 3, would apply emission specifications and control, monitoring, and recordkeeping requirements to owners or operators of VOC water separators. The number of facilities that might be affected is expected to be small because there are few chemical or petrochemical processing facilities that would require VOC water separators in the five counties. Available data indicates that operators of VOC water separators could pay as much as $50,000 per control unit and $15,000 per organic compound monitoring unit. Actual equipment costs would depend on the properties of the material separated and the type of equipment used to meet the control requirements.

The proposed rules in Subchapter C, Division 1, would apply emission specifications and control, monitoring, and recordkeeping requirements to owners or operators of VOC transfer operations. Affected transfer operations may occur at gasoline terminals and at other facilities where liquid VOCs are loaded onto or unloaded from tank trucks or rail cars. Transfer operations at gasoline terminals are already subject to control requirements in this division because the five affected counties are included as covered attainment counties. The proposed rulemaking would make the emission specification for gasoline terminals more stringent and would subject loading of non-gasoline VOC to control requirements. Some existing facilities may be able to meet the more stringent standard with their existing control devices at no additional cost. For owners or operators of facilities that install new controls to meet the standard, a vendor has estimated that costs could be in the range of $75,000 to $200,000 for a new combustor or $300,000 to $1 million for a new vapor recovery unit depending on the size.

The proposed rules in Subchapter C, Division 3, would require owners or operators of tank-truck tanks carrying gasoline or non-gasoline VOC to pass annual leak-tight tests. Tank-truck tanks carrying gasoline are already subject to the requirements because the five counties are included as covered attainment counties. For tank-truck tanks not currently subject to the requirements, available data suggests that the capital cost for trucks not equipped to meet the vapor recovery requirements would be approximately $1,700 to $2,700 per truck and that the cost of the annual vapor tightness testing would be $360 to $650 per truck.

The proposed rules in Subchapter D, Division 1, would apply emission specifications and control, monitoring, and recordkeeping requirements to owners or operators of vacuum-producing systems in petroleum refineries and petroleum refinery processes during process unit shutdowns and turnarounds. No adverse fiscal implication is anticipated from the proposed rules in Subchapter D, Division 1, because currently there are no petroleum refineries in the five affected counties.

The proposed rules in Subchapter D, Division 3, would apply emission specifications and control, monitoring, inspection, and recordkeeping requirements for control of fugitive emissions from equipment leaks to owners or operators of petroleum refining, natural gas/gasoline processing, and petrochemical processes. Currently, only four regulated entities are known to exist in the five affected counties that would be impacted by the proposed rules. The principal impact of the proposed rules would be the requirement to monitor for fugitive emissions, and the estimated labor cost for conducting the required fugitive monitoring is $0.50 to $1.00 per component.

The proposed rules in Subchapter E, Division 1, would apply emission specifications and control, monitoring, and recordkeeping requirements to owners or operators of cold solvent cleaners or degreasers. The controls are already applied for new degreasing facilities that have been placed in service since 1994 as a condition of their authorization under 30 TAC §106.454, but the proposed rules would extend the control requirements to existing facilities. Costs to owners or operators of facilities that have not previously been required to comply with these conditions are estimated to be approximately $500 - $1,000 for the smaller units that are most frequently used. The compliance cost for larger conveyorized facilities could be as much as $20,000, but not as many of these larger units are in use.

The proposed rules in Subchapter E, Division 3, would apply emission specifications and control, monitoring, and recordkeep-

ing requirements to owners or operators of flexographic and rotogravure printing processes that have a combined potential to emit 50 tons per year or more of VOC if uncontrolled. There are no known flexographic or rotogravure printing processes in the five affected counties, and this part of the proposed rules is not expected to have an immediate fiscal impact in the region.

The proposed rules in Subchapter E, Division 4, would apply emission specifications and control, monitoring, and recordkeeping requirements to owners or operators of offset lithographic printing processes that have a combined potential to emit 50 tons per year or more of VOC if uncontrolled. There are no known offset lithographic printing processes in the five affected counties, and this part of the proposed rules is not expected to have an immediate fiscal impact in the region.

The proposed rules in Subchapter F, Division 1, would require users and sellers of cutback asphalt containing VOC to limit its sale and use when paving roads, driveways, and parking lots. The commission does not anticipate any increase in cost to private entities from limiting the use of cutback asphalt because alternative materials are available at comparable prices.

The proposed rules in Subchapter F, Division 2, would apply emission specifications and control, monitoring, and recordkeeping requirements to owners or operators of pharmaceutical processes. There are no known pharmaceutical facilities in the five affected counties, and this part of the proposed rules is not expected to have an immediate fiscal impact in the region.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No significant adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Most of the proposed rules have exemption provisions based on emission level or size of equipment and are not anticipated to impact small or micro-businesses. However, the proposed rules for degreasing processes may affect small or micro-businesses, although the fiscal implications are not anticipated to be significant. Typically small or micro-businesses use commercial services to supply solvents and equipment used for degreasing operations, and the major suppliers of equipment and solvents in surrounding counties are already required to comply with similar requirements.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined the proposed rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rulemaking is intended to protect the environment and to reduce risks to human health from environmental exposure. However, as discussed in the fiscal note, the commission finds the proposed rulemaking will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety in the DFW area. Therefore, the proposed rulemaking does not meet the definition of a "major environmental rule."

Even if the proposed rulemaking is determined to meet the definition of a major environmental rule, the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The rulemaking is proposed to implement RACT controls for VOC emissions sources in the five newly designated nonattainment counties. Specifically, the proposed rulemaking would subject owners or operators of certain VOC-emitting facilities in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties to the same control, monitoring, testing, recordkeeping, and reporting requirements to which owners or operators of facilities in the other four counties in the DFW eight-hour ozone nonattainment area are subject.

The proposed rule is intended to protect the environment and to reduce risks to human health and safety from environmental exposure by reducing VOC emissions from sources subject to control requirements in Chapter 115, Subchapter B, Divisions 1 - 4; Subchapter C, Divisions 1 and 3; Subchapter D, Divisions 1 and 3; Subchapter E, Divisions 1, 3, and 4; and Subchapter F, Divisions 1 and 2.

The proposed rulemaking would implement requirements of the FCAA. Under 42 USC, §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, state SIPs shall include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter" (meaning Chapter 85, Air Pollution Prevention and Control, otherwise known as the FCAA). The provisions of the FCAA recognize states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and shall develop programs to assure their SIPs provide for implementation, maintenance, and enforcement of the NAAQS within the state.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB

633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states shall develop programs for each area contributing to nonattainment to help ensure those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the proposed rulemaking is to protect the environment and to reduce risks to human health by adoption of proposed rules to implement RACT controls for VOC emissions sources in the five newly designated nonattainment counties. The proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the agency, but is required by the Texas Clean Air Act, as codified in Texas Health and Safety Code, §382.0173. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because, even if the proposed rulemaking meets the definition of a "major environmental rule," it does not meet any of the four applicability criteria for a major environmental rule.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the proposed rulemaking is to implement RACT controls for VOC emissions sources in the five newly designated nonattainment counties. Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

In addition, the commission's assessment indicates Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). As addressed elsewhere in this preamble, 42 USC, §7410 specifically requires states to adopt and implement SIPs that provide for implementation, maintenance, and enforcement of the NAAQS within the state. This proposed rulemaking is a required component of the Texas SIP. The action will specifically advance the health and safety purpose by reducing VOC emissions in the DFW area. The rulemaking specifically targets sources with VOC emissions. Consequently, the proposed rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code,

§§33.201 *et seq*.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and the proposed amendments will maintain at least the same level of or increase the level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.32). This rulemaking action complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms this rulemaking action is consistent with CMP goals and policies.

The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The requirements of Chapter 115 are applicable requirements of 30 TAC Chapter 122. Owners or operators of sites that are subject to the Federal Operating Permit Program will be required to obtain, revise, reopen, and renew their Federal Operating Permits as appropriate in order to include the requirements of this proposed rulemaking, if it is adopted by the commission.

ANNOUNCEMENT OF HEARINGS

Two public hearings on this proposal will be held on August 8, 2006, at 2:30 p.m. and 6:30 p.m., Waxahachie City Hall Council Chambers, 401 S. Rogers, Waxahachie, Texas. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. A time limit may be established at each hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to informally discuss the proposal 30 minutes before each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Teresa Hurley at (512) 239-5316. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, e-mailed to *TRRules@tceq.state.tx.us*, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2006-011-115-EN. The comment period closes August 14, 2006. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Teresa Hurley of the Air Quality Planning and Implementation Division at (512) 239-5316.

SUBCHAPTER A. DEFINITIONS

30 TAC §115.10

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.10. Definitions.

Unless specifically defined in Texas Health and Safety Code, Chapter 382, (also known as the Texas Clean Air Act) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the Texas Clean Air Act, the following terms, when used in this chapter (relating to Control of Air Pollution from Volatile Organic Compounds), have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this chapter are found in §3.2 and §101.1 of this title (relating to Definitions).

(1) - (8) (No change.)

(9) Covered attainment counties--[~~For purposes of Subchapter C, Volatile Organic Compound Transfer Operations, Division 2, Filling of Gasoline Storage Vessels (Stage I) for Motor Vehicle Fuel Dispensing Facilities,~~] Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Karnes, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacog-

doches, Navarro, Newton, Nueces, Panola, Polk, Rains, Red River, Refugio, Robertson, Rusk, Sabine, San Augustine, San Jacinto, San Patricio, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties. [~~For all other divisions, Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Augustine, San Jacinto, San Patricio, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.~~]

(10) Dallas/Fort Worth area--For purposes of Subchapter B of this chapter, General Volatile Organic Compound Sources, Division 5, Municipal Solid Waste Landfills, Collin, Dallas, Denton, and Tarrant Counties. For all other divisions, [~~C, Volatile Organic Compound Transfer Operations, Division 2, Filling of Gasoline Storage Vessels (Stage I) for Motor Vehicle Fuel Dispensing Facilities, and Subchapter E, Solvent-Using Processes, Division 2, Surface Coating Processes,~~] Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties. [~~For all other divisions, Collin, Dallas, Denton, and Tarrant Counties.~~]

(11) - (48) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603542
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

SUBCHAPTER B. GENERAL VOLATILE ORGANIC COMPOUND SOURCES
DIVISION 1. STORAGE OF VOLATILE ORGANIC COMPOUNDS

30 TAC §115.119

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.119. Counties and Compliance Schedules.

(a) The owner or operator of each stationary tank, reservoir, or other container in which any volatile organic compound (VOC) is placed, stored, or held [~~All persons~~] in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Harris, Hardin, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties shall continue to comply with this division (relating to Storage of Volatile Organic Compounds) as required by §115.930 of this title (relating to Compliance Dates). [~~affected by the requirement to calculate and report emissions resulting from secondary seal gaps that exceed 1/8 inch (0.32 cm) where the accumulated area of such gaps is greater than 1.0 square inch per foot (21 square centimeters per meter) of tank diameter as specified in §115.116(a)(2) of this title (relating to Monitoring and Recordkeeping Requirements) shall be in compliance with these calculation and emission reporting requirements beginning with the calendar year that starts on January 1, 1996.~~]

(b) The owner or operator of each stationary tank, reservoir, or other container in which any VOC is placed, stored, or held in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply with this division as soon as practicable, but no later than March 1, 2009. [~~All persons in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Harris, Hardin, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties affected by the requirement to conduct annual visual inspections of internal floating roof storage tanks as specified in §115.114(a)(1) of this title (relating to Inspection Requirements) shall be in compliance with these inspection requirements as soon as practicable, but no later than March 7, 1997.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603543
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

DIVISION 2. VENT GAS CONTROL

30 TAC §115.129

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.129. Counties and Compliance Schedules.

(a) (No change.)

(b) The owner or operator of each bakery in Collin, Dallas, Denton, and Tarrant Counties subject to §115.122(a)(3)(C) of this title (relating to Control Requirements) shall comply with §§115.121(a)(3), 115.122(a)(3)(C), and 115.126(6) of this title (relating to Emission Specifications; Control Requirements; and Monitoring and Recordkeeping Requirements) as soon as practicable, but no later than one year, after the commission publishes notification in the *Texas Register* of its determination that this contingency rule is necessary as a result of failure to attain the national ambient air quality standard (NAAQS) for ozone by the attainment deadline or failure to demonstrate reasonable further progress as set forth in Federal Clean Air Act (FCAA) [~~the FCAA~~], §172(c)(9).

(c) The owner or operator of each bakery in El Paso County subject to §115.122(a)(3)(D) of this title shall comply with §§115.121(a)(3), 115.122(a)(3)(D), and 115.126(6) of this title as soon as practicable, but no later than one year, after the commission publishes notification in the *Texas Register* of its determination that this contingency rule is necessary as a result of failure to attain the NAAQS for ozone by the attainment deadline or failure to demonstrate reasonable further progress as set forth in [~~the~~] FCAA, §172(c)(9).

(d) The owner or operator of each vent gas stream in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply with this division as soon as practicable, but no later than March 1, 2009.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603544
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

DIVISION 3. WATER SEPARATION

30 TAC §115.139

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.139. Counties and Compliance Schedules.

(a) The owner or operator of each volatile organic compound (VOC) water separator [~~All affected persons~~] in Aransas, Bexar, Brazoria, Calhoun, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Matagorda, Montgomery, Nueces, Orange, San Patricio, Tarrant, Travis, Victoria, and Waller Counties shall continue to comply with this division (relating to Water Separation) as required by §115.930 of this title (relating to Compliance Dates).

(b) The owner or operator of each VOC water separator in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply with this division as soon as practicable, but no later than March 1, 2009.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603545
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

DIVISION 4. INDUSTRIAL WASTEWATER

30 TAC §115.149

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.149. Counties and Compliance Schedules.

(a) The owner or operator of each affected source category within a plant in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Hardin, Galveston, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties shall continue to comply with this division (relating to Industrial Wastewater) as required by §115.930 of this title (relating to Compliance Dates).

(b) The owner or operator of each affected source category within a plant in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply [~~Hardin, Jefferson, and Orange Counties shall be in compliance~~] with this division as soon as practicable, but no later than March 1, 2009 [~~December 31, 2002~~].

[~~(c) The owner or operator of each affected source category within a plant in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties shall control all junction boxes equipped with pumps in accordance with §115.142(1)(D)(ii)(II) of this title (relating to Control Requirements) as soon as practicable, but no later than December 31, 2002.~~]

[~~(d) The owner or operator of each affected source category within a plant in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties shall control all biotreatment units in accordance with §115.142(3) and §115.144(4) of this title (relating to Control Requirements; and Inspection and Monitoring Requirements) as soon as practicable, but no later than December 31, 2002.~~]

[~~(e) The owner or operator of each affected source category within a plant in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties shall comply with the requirement in §115.142(1)(A) of this title for gasketed seals or tightly-fitting caps or plugs on process drains not equipped with water seal controls as soon as practicable, but no later than December 31, 2003.~~]

[~~(f) The owner or operator of each affected source category within a plant in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties shall comply with the requirement in §115.142(1)(H) of this title for a first attempt at repair within five calendar days and for follow-up monitoring as soon as practicable, but no later than December 31, 2003.~~]

[~~(g) The owner or operator of each affected source category within a plant in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties shall comply with the requirements in §115.144(5) and (6) of this title for water seal inspections and inspections of process drains not equipped with water seals as soon as practicable, but no later than December 31, 2003.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603546
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

SUBCHAPTER C. VOLATILE ORGANIC COMPOUND TRANSFER OPERATIONS
DIVISION 1. LOADING AND UNLOADING OF VOLATILE ORGANIC COMPOUNDS

30 TAC §115.219

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare,

and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.219. Counties and Compliance Schedules.

(a) - (c) (No change.)

(d) The owner or operator of each gasoline terminal, gasoline bulk plant, and VOC transfer operation in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply with this division as soon as practicable, but no later than March 1, 2009. The owner or operator of each gasoline terminal, gasoline bulk plant, and VOC transfer operation in these counties shall continue to comply with the applicable requirements in §§115.211(2), 115.212(b), and 115.214(b) of this title (relating to Emission Specifications; Control Requirements; and Inspection Requirements) until the facility achieves compliance with the newly applicable requirements in §§115.211(1), 115.212(a), and 115.214(a) of this title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603547
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

DIVISION 3. CONTROL OF VOLATILE ORGANIC COMPOUND LEAKS FROM TRANSPORT VESSELS

30 TAC §115.239

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.239. Counties and Compliance Schedules.

(a) - (b) (No change.)

(c) The owner or operator of each tank-truck tank in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply with this division as soon as practicable, but no later than March 1, 2009. The owner or operator of each gasoline tank-truck tank in these counties shall continue to comply with the applicable requirements in §115.234(b) and §115.235(b) of this title (relating to Inspection Requirements and Approved Test methods) until the facility achieves compliance with the newly applicable requirements in §115.234(a) and §115.235(a) of this title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603548
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

SUBCHAPTER D. PETROLEUM REFINING, NATURAL GAS PROCESSING, AND PETROCHEMICAL PROCESSES
DIVISION 1. PROCESS UNIT TURNAROUND AND VACUUM-PRODUCING SYSTEMS IN PETROLEUM REFINERIES

30 TAC §115.319

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules,

which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.319. Counties and Compliance Schedules.

(a) All affected persons in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Montgomery, Nueces, Orange, Tarrant, Victoria, and Waller Counties shall continue to comply with this division (relating to Process Unit Turnaround and Vacuum-Producing Systems in Petroleum Refineries) as required by §115.930 of this title (relating to Compliance Dates).

(b) All affected persons in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply with this division as soon as practicable, but no later than March 1, 2009.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603549
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

DIVISION 3. FUGITIVE EMISSION CONTROL IN PETROLEUM REFINING, NATURAL GAS/GASOLINE PROCESSING, AND PETROCHEMICAL PROCESSES IN OZONE NONATTAINMENT AREAS

30 TAC §115.359

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.359. Counties and Compliance Schedules.

(a) The owner or operator of each affected source in Brazoria, Chambers, Collin, El Paso, Dallas, Denton, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties shall [~~must:~~]

[~~(1)~~] continue to comply with this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas) as required by §115.930 of this title (relating to Compliance Dates).[~~;~~]

[~~(2) comply with §115.356(2)(C) of this title (relating to Recordkeeping Requirements) as soon as practicable, but no later than March 31, 2004; and~~]

[~~(3) develop and make available upon request to the executive director, United States Environmental Protection Agency, and any local air pollution control agency having jurisdiction the recordkeeping required by §115.356(1) and (3) of this title as soon as practicable, but no later than March 31, 2004.~~]

(b) The owner or operator of each affected source in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply with this division as soon as practicable, but no later than March 1, 2009.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603550
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

SUBCHAPTER E. SOLVENT-USING PROCESSES

DIVISION 1. DEGREASING PROCESSES

30 TAC §115.419

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.419. Counties and Compliance Schedules.

(a) - (b) (No change.)

(c) All affected persons in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply with the applicable sections of this division as soon as practicable, but no later than March 1, 2009.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603551
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

DIVISION 3. FLEXOGRAPHIC AND ROTOGRAVURE PRINTING

30 TAC §115.439

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.439. Counties and Compliance Schedules.

(a) All affected persons in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Montgomery, Nueces, Orange, Tarrant, Victoria, and Waller Counties shall continue to comply with applicable sections of this division (relating to Flexographic and Rotogravure Printing) as required by §115.930 of this title (relating to Compliance Dates).

(b) All affected persons in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply with this division as soon as practicable, but no later than March 1, 2009.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603552
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

DIVISION 4. OFFSET LITHOGRAPHIC PRINTING

30 TAC §115.449

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.449. Counties and Compliance Schedules.

(a) In El Paso County, all offset lithographic printing presses must [~~shall~~] be in compliance with §§115.442, 115.443, 115.445, and 115.446 of this title (relating to Control Requirements; Alternate Control Requirements; Approved Test Methods [~~Testing Requirements~~]; and Monitoring and Recordkeeping Requirements) as soon as practicable, but no later than November 15, 1996.

(b) In Collin, Dallas, Denton, and Tarrant Counties, all offset lithographic printing presses on a property that [~~which~~], when uncontrolled, emit a combined weight of volatile organic compound (VOC) equal to or greater than 50 tons per calendar year, must [~~shall~~] be in compliance with §§115.442, 115.443, 115.445, and 115.446 of this title as soon as practicable, but no later than December 31, 2000.

(c) In Collin, Dallas, Denton, and Tarrant Counties, all offset lithographic printing presses on a property that [~~which~~], when uncontrolled, emit a combined weight of VOC less than 50 tons per calendar year, must [~~shall~~] be in compliance with §§115.442, 115.443, 115.445, and 115.446 of this title as soon as practicable, but no later than one year, after the commission publishes notification in the *Texas Register* of its determination that this contingency rule is necessary as a result of failure to attain the national ambient air quality standard (NAAQS) for ozone by the attainment deadline or failure to demonstrate reasonable further progress as set forth in the 1990 Amendments to the Federal Clean Air Act (FCAA), §172(c)(9).

(d) In Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, all offset lithographic printing presses on a property that [~~which~~], when uncontrolled, emit a combined weight of VOC equal to or greater than 25 tons per calendar year, must [~~shall~~] be in compliance with §§115.442, 115.443, 115.445, and 115.446 of this title as soon as practicable, but no later than December 31, 2002.

(e) In Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, all offset lithographic printing presses on a property that [~~which~~], when uncontrolled, emit a combined weight of VOC less than 25 tons per calendar year, must [~~shall~~] be in compliance with §§115.442, 115.443, 115.445, and 115.446 of this title as soon as practicable, but no later than one year, after the commission publishes notification in the *Texas Register* of its determination that this contingency rule is necessary as a result of failure to attain the NAAQS for ozone by the attainment deadline or failure to demonstrate reasonable further progress as set forth in the FCAA, §172(c)(9).

(f) In Ellis, Johnson, Kaufman, Parker, and Rockwall Counties, the owner or operator of all offset lithographic printing presses on a property that when uncontrolled, emit a combined weight of VOC equal to or greater than 50 tons per calendar year, shall comply with §§115.442, 115.443, 115.445, and 115.446 of this title as soon as practicable, but no later than March 1, 2009.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603553
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

SUBCHAPTER F. MISCELLANEOUS INDUSTRIAL SOURCES
DIVISION 1. CUTBACK ASPHALT

30 TAC §115.519

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.519. Counties and Compliance Schedules.

(a) (No change.)

(b) All affected persons in Bastrop, Caldwell, Hays, Travis, and Williamson Counties shall comply with applicable sections of this division [~~(relating to Cutback Asphalt)~~] as soon as practicable, but no later than December 31, 2005.

(c) All affected persons in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply with applicable sections of this division as soon as practicable, but no later than March 1, 2009.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603554
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

DIVISION 2. PHARMACEUTICAL MANUFACTURING FACILITIES

30 TAC §115.539

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Texas Health and Safety Code, Chapter 382; and FCAA, 42 USC, §§7401 *et seq*.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051(d); and FCAA, 42 USC, §§7401 *et seq*.

§115.539. Counties and Compliance Schedules.

(a) All affected persons in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Montgomery, Nueces, Orange, Tarrant, Victoria, and Waller Counties shall continue to comply with this division (relating to Pharmaceutical Manufacturing Facilities) as required by §115.930 of this title (relating to Compliance Dates).

(b) All affected persons in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply with this division as soon as practicable, but no later than March 1, 2009.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603555
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 239-6087

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER F. MOTOR VEHICLE SALES TAX

34 TAC §3.84

The Comptroller of Public Accounts proposes amendments to §3.84, concerning exemption for orthopedically handicapped person. The proposed amendments make the rule consistent with legislative changes effective October 1, 2003 concerning the time period during which modifications allowed under the exemption must be completed. A new subsection (e) is added accordingly. The amendments also clarify in subsection (d) what documentation is necessary to claim the exemption. The definitions in subsection (a) clarify what types of modifications are covered by the exemption and what it means for any motor vehicle to be primarily driven by, or primarily used to transport, an orthopedically handicapped person. Additional non-substantive changes, including the adding of a new subsection (c) relating to persons eligible for the exemption, are made for clarity.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in identifying the tax responsibilities of sellers and purchasers of motor vehicles modified for orthopedically handicapped persons. This rule is adopted un-

der Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code §152.086.

§3.84. Exemption for Orthopedically Handicapped Person.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) A motor vehicle modified for operation by an orthopedically handicapped person is:

(A) a vehicle that has been specially modified by altering such items as the conventional brake, acceleration, or steering systems to facilitate the operation of the vehicle by an orthopedically handicapped driver; or

(B) a vehicle that has been specially modified by installing such items as a wheelchair lift, hoist, or attached ramp to allow an orthopedically handicapped driver to enter the vehicle.

(2) [~~(1)~~] A motor [~~Motor~~] vehicle modified for [~~the~~] transportation of an orthopedically handicapped person--A vehicle that [~~which~~] has been specially modified by the installation of such items as [~~either~~] a wheelchair lift, hoist, attached [~~or~~] ramp, [~~or~~] wheelchair hold-down clamps, or special seat restraints other than conventional seat belts to allow for the transportation of an orthopedically handicapped person in a reasonable manner.

[~~(2) Motor vehicle modified for operation by an orthopedically handicapped person--~~]

[~~(A) a vehicle which has been specially modified by altering conventional brake, acceleration, or steering systems to facilitate the operation of the vehicle by an orthopedically handicapped driver; or~~]

[~~(B) a vehicle which has been modified by installing a wheelchair lift, hoist, or ramp to allow an orthopedically handicapped driver to enter the vehicle.~~]

(3) Orthopedically handicapped person--An individual who has limited movement of body extremities and/or loss of physical functions. The physical impairment must be such that the person is either unable to operate, or be transported in a reasonable manner in, a motor vehicle that [~~which~~] has not been specially modified.

(b) Vehicles exempted. A motor vehicle is exempt from sales and use tax if:

[~~(1) There are exempted from motor vehicle sales and use tax the use and the receipts from the sale of a motor vehicle that~~]:

(1) [~~(A)~~] it has been or will be modified for operation by, or for the transportation of, a person who is [~~an~~] orthopedically handicapped at the time of purchase [~~person~~]; and

(2) [~~(B)~~] is primarily driven by, or primarily used for the transportation of, an orthopedically handicapped person.

(c) [~~(2)~~] Eligible purchasers. An individual, partnership, corporation, or association may purchase a vehicle under this exemption if the requirements of this section [~~specified in paragraphs (1)(A) and (B) of this subsection~~] are satisfied.

(d) [~~(c)~~] Documentation required for exemption.

(1) Motor vehicle [~~Vehicle~~] modified for operation by an orthopedically handicapped person [~~persons~~]. A person claiming this exemption must present to the county assessor and collector of taxes:

(A) a restricted Texas driver's license which requires a modification restriction on the vehicle and verifies that the orthopedically handicapped driver is so physically impaired as to be unable to operate a motor vehicle which has not been modified; or

(B) an invoice or other appropriate document from an installer of special equipment which describes both the modification and the vehicle being modified.

(2) A motor vehicle [~~Vehicles~~] modified for transportation of an [~~transporting of~~] orthopedically handicapped person. A person claiming this exemption must present to the county assessor and collector of taxes a copy of a prescription or statement from a licensed practitioner of the healing arts identifying the adaptive devices and/or modifications that are necessary to reasonably transport the orthopedically handicapped person or an invoice or other document from an installer of special equipment. The invoice or document must describe modification and the vehicle being modified for transporting an orthopedically handicapped person.

(3) Alternate documentation. If the documentation is unavailable at the time of registration, the person claiming this exemption must present a sworn statement describing the modification to be made and the installer who will be making the modification. This sworn statement should be made on the seller, donor, or trader's affidavit form.

(e) Time period to complete modifications. Modifications to motor vehicles purchased on or after October 1, 2003 must be completed within two years of the date of purchase or the exemption is invalid.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603531
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 475-0387

CHAPTER 5. FUNDS MANAGEMENT (FISCAL AFFAIRS)

SUBCHAPTER C. CLAIMS PROCESSING--TRAVEL VOUCHERS

34 TAC §5.22

The Comptroller of Public Accounts proposes amendments to §5.22, concerning incorporation by reference: "State of Texas Travel Allowance Guide."

The amendments are necessary because of the issuance of a new "State of Texas Travel Allowance Guide" by the comptroller in June 2006. The new guide reflects changes made by the 79th Legislature, 2005, to the travel provisions of the General Appropriations Act. The new guide also includes policy changes that are intended to promote efficiency and eliminate ambiguities concerning the travel of state officers and employees. Chapter 9 of the new guide lists the major differences between it and the previous guide. A copy of the new guide is available upon request from Claims Division, P.O. Box 13528, Austin, Texas 78711.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the amendment will be in effect, there will be no foreseeable implications relating to costs or revenues of the state or local governments.

Mr. Heleman also has determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of adopting the amendment will be helping ensure that the travel expenses incurred by state officers and employees are paid or reimbursed in accordance with applicable law. The proposed amendment would not have an adverse effect on small businesses or micro-businesses. There is no significant economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be addressed to Joani Bishop, Manager, Claims Division, P.O. Box 13528, Austin, Texas 78711. If a person wants to ensure that the comptroller considers and responds to a comment made about this proposal, then the person must ensure that the comptroller receives the comment not later than the 30th day after the issue date of the *Texas Register* in which this proposal appears. If the 30th day is a state or national holiday, Saturday, or Sunday, then the first workday after the 30th day is the deadline.

The amendments are proposed under Government Code, §660.021, which requires the comptroller to adopt rules to administer the Travel Regulations Act and the travel provisions of the General Appropriations Act.

The amendments implement Government Code, §403.248 and §660.001 - 660.208. The amendments also implement the following provisions of the General Appropriations Act: Article III, Sections 7, 9, and 12; Article IV, Section 9(a); Article IX, Sections 4.04(a), (e) - (f), 5.01 - 5.08, 6.19(b) - (c); Rider 31 in the appropriations to the Department of Aging and Disability Services; Rider 5 in the appropriations to the Department of Banking; Rider 3 in the appropriations to the Department of Criminal Justice; Rider 5 in the appropriations to the Department of Housing and Community Affairs; Rider 2 in the appropriations to the University of Houston System Administration; Rider 7 in the appropriations to the Department of Insurance; Rider 7 in the appropriations to the Texas Lottery Commission; Rider 3 in the appropriations to Midwestern State University; Rider 2 in the appropriations to the University of North Texas System Administration; Rider 18 in the appropriations to the Department of Public Safety; Rider 3 in the appropriations to the Racing Commission; Rider 3 in the appropriations to the Savings and Loan Department; Rider 9 in the appropriations to the secretary of state; Rider 14 in the appropriations to the Department of State Health Services; Rider 3 in the appropriations to Stephen F. Austin State University; Rider 2 in the appropriations to the Texas River Compact Commissions; Rider 9 in the appropriations to the Teacher Retirement System; Rider 2 in the appropriations to the Texas A&M University System Administrative and General Offices; Rider 4 in the appropriations to Texas Southern University; Rider 3 in the appropriations to Texas State Technical College System Administration; Rider 2 in the appropriations to the Board of Regents, Texas State University System Central Office; Rider 3 in the appropriations to The University of Texas System Administration; Rider 2 in the appropriations to Texas Tech University System Administration; Rider 3 in the appropriations to Texas Woman's University; and Rider 27 in the appropriations to the Texas Workforce Commission.

§5.22. Incorporation by Reference: "State of Texas Travel Allowance Guide".

The "State of Texas Travel Allowance Guide," which was issued by the comptroller in June 2006 [~~October~~ ~~2004~~] and filed with the secretary of state, is incorporated by reference as a section. The guide is published by the comptroller in Austin, Texas, and copies may be obtained from the comptroller upon request.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 28, 2006.

TRD-200603487
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 475-0387

♦ ♦ ♦

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 35. PRIVATE SECURITY

SUBCHAPTER A. DEFINITIONS

37 TAC §35.1

The Texas Department of Public Safety proposes amendments to §35.1, concerning Definitions. The amendments to the section are necessary in order to clarify various issues of statutory application and construction.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the amendments are in effect there will be no fiscal implications for state or local governments, or local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the amendments are in effect the anticipated public benefit resulting from adoption of the amended section will be greater clarity in the meaning of the statute and the standards by which the Bureau enforces the statute. There may be a minimal economic cost to some licensees resulting from the amendments. There is no anticipated adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed amendments are requested and may be sent to Cliff Grumbles, Manager, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-7711.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061.

§35.1. Definitions.

The following words or terms, when used in this chapter, shall have the following meaning, unless the context clearly indicates otherwise:

(1) - (4) (No change.)

(5) Conviction--Any final adjudication of guilt, whether pursuant to a plea of guilty or nolo contendre, or pronouncement of guilt by judge or jury [~~otherwise~~], and any [~~deferred or~~] suspended sentence, [~~or~~] judgment, or community supervision, including those judgments of community supervision that have been dismissed or convictions that have been set aside [~~or pre- trial diversion~~].

(6) - (8) (No change.)

[~~(9) Manager--Means the manager of the Texas Private Security Bureau.~~]

(9) [~~(10)~~] Shareholder--Means any individual holding stock in a licensee who is actively involved in the normal course of operation and business of the licensee and shall not include those individuals who hold stock in the licensee solely for the purposes of investment.

(10) Advertisement--For purposes of §35.37 of this title (relating to Information Shown in Advertisements), an advertisement is any printed, digital, or electronic media created or used for the purpose of promoting the regulated business of the licensee.

[~~(11) Advertising--Means the direct solicitation for business which requires a license under the provisions of this Act and involving more than a mere listing of a licensee's name, address and telephone number.~~]

(11) [~~(12)~~] Undercover Agent--A person as defined under §1702.240 of the Act, requiring protected identity, during the course and scope of a specific, ongoing, investigation.

(12) [~~(13)~~] State--means the State of Texas or any political subdivision thereof.

(13) Maintenance of supervisory position on a daily basis--For purposes of §1702.120, Texas Occupations Code, this phrase requires that the manager have continuous oversight of no more than three (3) companies and two (2) schools, the supervised individuals, or their intermediate level supervisors, in a manner sufficient to ensure that all supervised individuals are complying with these rules and with the Act.

(14) Employment, Business Activity--These terms, or similar terms or phrases used in the Act or in these rules, are not limited in their meaning to "for profit" enterprises or to work performed for remuneration, but include any provision of services regulated by the Bureau, such as services provided on a volunteer or unpaid basis.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 28, 2006.

TRD-200603484

Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 424-2135

♦ ♦ ♦

SUBCHAPTER C. STANDARDS

37 TAC §35.34

The Texas Department of Public Safety proposes amendments to §35.34, concerning Standards of Conduct. The amendments to the section are necessary in order to encourage cooperation with the department's investigators and to provide guidelines for appropriate conduct on the part of licensees.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the amendments are in effect there will be minimal fiscal implications for state or local governments. There will be no fiscal implications for local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the amendments are in effect the anticipated public benefit resulting from adoption of the amended section will be more efficient investigation of complaints and a higher standard of behavior on the part of licensees. There may be negligible economic cost to the licensees resulting from the amendments. There is no anticipated adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed amendments are requested and may be sent to Cliff Grumbles, Manager, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-7711.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061.

§35.34. Standards of Conduct.

(a) - (c) (No change.)

(d) Licensees shall cooperate fully with any investigation conducted by the Bureau, including but not limited to, providing employee records upon reasonable request by the Bureau or its investigators, and shall comply with any subpoena issued by the Bureau pursuant to §1702.367 [~~will make copies of contracts with clients available to board investigators when served with a subpoena signed by the investigator for copies of said contracts if a written contract was utilized~~].

(e) - (l) (No change.)

(m) No licensee shall engage in conduct while that would constitute a Class C misdemeanor or higher offense under any Texas statute, nor engage or threaten to engage in any act of violence, aggression, destruction of property, or lewd, lascivious, obscene or otherwise offensive behavior, arising from or in any way related to the performance of one's duties or one's employment under the Act, or at any time while wearing a uniform associated with one's employment under the Act or while otherwise representing oneself as acting within the scope of one's duties or employment under the Act [~~in the course, scope or performance of their duties that constitutes~~

a ~~Class C misdemeanor or greater offense as provided in the Texas Penal Code, Alcoholic Beverage Code, or Health and Safety Code~~].

(n) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 28, 2006.

TRD-200603485
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 424-2135

♦ ♦ ♦

37 TAC §35.36

The Texas Department of Public Safety proposes amendments to §35.36, concerning Consumer Information. Amendments to the section are necessary in order to enhance the requirements related to the provision of consumer complaint information. In addition, the title of the section is being amended.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local governments, or local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the rule is in effect the anticipated public benefit resulting from adoption of the section will be improved provision of information regarding the procedure for filing complaints, and greater assistance available to the public with regard to filing complaints. There may be some minimal economic cost to some licensees resulting from this amendment. There is no anticipated adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed amendment are requested and may be sent to Cliff Grumbles, Manager, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-7711.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061.

§35.36. Consumer Information and Vehicle Signage.

(a) A licensee shall, either orally or in writing, notify all consumers or recipients of services of the license number and the name, mailing address, and telephone number of the Private Security Bureau for the purpose of directing complaints [~~bureau on each written contract for services~~].

(b) If a licensee chooses to provide the notice required by subsection (a) of this section in written form, the notification shall contain their license number, the name, mailing address and telephone number of the Bureau, in a type-face of the same size as that which appears in the document as a whole, but in no case less than 10 point size.

(c) [~~(b)~~] A licensed company must display conspicuously [~~prominently~~] in the principal place of business and any branch office, a sign containing the name, mailing address, and telephone number of the bureau, and a statement informing consumers or recipients of services that complaints against licensees can be directed to the bureau.

(d) The company license number must be in letters and numbers at least one inch high and permanently affixed or magnetically attached to each side of the vehicle in a color contrasting with the background color.

(e) Vehicles operated by private investigators or personal protection officers are exempt and vehicles operated for administrative purposes are exempt.

[~~(c) Signs required to be displayed in the place of business of a licensed company shall be obtained from the bureau.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 28, 2006.

TRD-200603483
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 424-2135

♦ ♦ ♦

37 TAC §35.41

The Texas Department of Public Safety proposes new §35.41, concerning Company Names. The new section will provide guidelines to staff and the public regarding appropriate names for licensed companies, consistent with the statutory prohibitions against representation of a relationship with law enforcement.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be minimal fiscal implications for state government or local governments. There will be no fiscal implications for local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the rule is in effect the anticipated public benefit resulting from adoption of the new section will be less confusion on the part of the public concerning licensees' purported affiliations with law enforcement agencies. There may be some economic costs to the licensees resulting from the adoption of this new section. There is no anticipated adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed amendment are requested and may be sent to Cliff Grumbles, Manager, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-7711.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed new rule affects Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061.

§35.41. Company Names.

No entity regulated by Chapter 1702 may use a name that contains the phrase "law enforcement," or substantially similar terms; or any other terms, name or combination of names, or a name for which the acronym is intended to or could reasonably give the impression that the entity is in any way associated with a governmental body or agency, or a branch or political subdivision of any government.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 28, 2006.

TRD-200603482
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 424-2135

♦ ♦ ♦

SUBCHAPTER F. ADMINISTRATIVE HEARINGS

37 TAC §35.91

The Texas Department of Public Safety proposes amendments to §35.91, concerning Administrative Hearing Procedures. The amendments to the section are necessary in order to clarify the application of the Administrative Procedure Act to the hearings procedures provided in Chapter 1702 of the Occupations Code.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the amendments are in effect there will be minimal fiscal implications for state and local government. There will be no implications for local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the amendments are in effect the anticipated public benefit resulting from adoption of the amended section will be less confusion concerning the application of the Administrative Procedures Act to the hearings conducted pursuant to Chapter 1702 of the Occupations Code. There is no anticipated economic cost to individuals. There is no anticipated adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed amendments are requested and may be sent to Cliff Grumbles, Manager, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-7711.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061.

§35.91. Administrative Hearing Procedures.

With the exception of preliminary hearings conducted pursuant to §1702.0364 (Summary Suspensions or Denials), all hearings [~~Hearings~~] and appeal procedures related to all administrative hearings conducted by the Board [~~board~~] are governed by Texas Government Code, Chapter 2001.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 28, 2006.

TRD-200603486
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 424-2135

♦ ♦ ♦

SUBCHAPTER O. FEES

37 TAC §35.231

The Texas Department of Public Safety proposes amendments to §35.231, concerning Fees. Amendments to the section are necessary in order to adjust the fees required for renewal applications.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be minimal fiscal implications for state government. There will be no fiscal implications for local government or local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the rule is in effect the anticipated public benefit resulting from adoption of the amendment will be greater access to licensing information and processing through internet technology. There will be a minor economic cost to the licensees resulting from this amendment. These fees are authorized and required by Texas Government Code, §2054.252(e) and (g). There is no anticipated adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed amendment are requested and may be sent to Cliff Grumbles, Manager, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-7711.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061.

§35.231. Subscription Fees for Renewals.

(a) Each individual licensee, registrant or commissioned security officer shall pay the following fee for occupational license renewal: $3.00 for a $30.00 [~~$20.00 to $25.00~~] renewal and $5.00 for renewals from $50.00 to $100.00. This fee is in addition to the renewal fee.

(b) Each company licensee shall pay the following fee for occupational license renewal: $7.00 for a $225.00 renewal; $11.00 [~~$8.00~~] for a $300.00 to $350.00 [~~$250.00~~] renewal; $12.00 [~~$9.00~~] for a $400.00 [~~$300.00~~] renewal; and $16.00 [~~$13.00~~] for a $540.00 [~~$440.00~~] renewal. This fee is in addition to the renewal fee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 28, 2006.

TRD-200603481
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 424-2135

♦ ♦ ♦

37 TAC §35.232

The Texas Department of Public Safety proposes amendments to §35.232, concerning Fees. Amendments to the section are necessary in order to adjust the fees required for original applications.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the rule is in effect the anticipated public benefit resulting from adoption of the section will be greater access to licensing information and processing through internet technology. There is a minor economic cost to the licensees resulting from this amendment. These fees are authorized and required by Texas Government Code, §2054.252(e) and (g). There is no anticipated adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed amendment are requested and may be sent to Cliff Grumbles, Manager, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-7711.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061.

§35.232. Subscription Fees for Original Applications.

(a) Each individual applicant for a license, registration, or security officer commission [~~applicant~~] shall pay the following fee upon application: $3.00 for a $30.00 [~~$20.00 to $25.00~~] application; and $5.00 for a $50.00 to $100.00 application. This fee is in addition to the application fee.

(b) Each company license applicant shall pay the following fee upon application: $11.00 [~~$8.00~~] for a $300.00 to 350.00 [~~$250.00~~] application; $12.00 [~~$9.00~~] for a $400.00 [~~$300.00~~] application; and $16.00 [~~$13.00~~] for a $540.00 [~~$440.00~~] application. This fee is in addition to the application fee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 28, 2006.

TRD-200603480
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 424-2135

♦ ♦ ♦

SUBCHAPTER S. CONTINUING EDUCATION

37 TAC §35.291

The Texas Department of Public Safety proposes amendments to §35.291, concerning Mandatory Continuing Education Courses. Amendments to the section are necessary in order to enhance the continuing education requirements for individuals licensed under Chapter 1702 of the Occupations Code.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local governments, or local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the rule is in effect the anticipated public benefit resulting from adoption of the section will be better trained licensees, and specifically, licensees with a greater familiarity with the statute and rules applicable to their licensed conduct. There may be minimal economic costs to the licensees resulting from this amendment, depending on the specific license and the number of years it has been in effect. There is no anticipated adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed amendment are requested and may be sent to Cliff Grumbles, Manager, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-7711.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061.

§35.291. Mandatory Continuing Education Courses.

(a) A license may not be renewed until the required minimum hours of board approved continuing education credits have been obtained in accordance with the Act and board rules. Proof of the required continuing education must be maintained by the employer and contained in the personnel file of the registrant's employing company.

(1) All registrants not specifically addressed in this section shall complete a total of eight (8) hours of continuing education, seven hours of which must be in subject matter that relates to the type of registration held, and one (1) hour of which must cover ethics.

(2) Non-participating owners, partners, shareholders, non-commissioned security officers and administrative support personnel are specifically exempted from the continuing education requirements.

(3) Private investigators and managers of Class A and Class C licenses with more than fifteen (15) years of continued registration as a private investigator or manager of a Class A or Class C license shall complete a total of twelve (12) [~~sixteen (16)~~] hours of continuing education, eight (8) [~~fourteen (14)~~] hours of which must be in subject matter that relates to the type of registration held, [~~and~~] two

(2) hours of which must be over ethics, and two (2) hours of which must involve the review of Texas Occupations Code, Chapter 1702, and the Board's Administrative Rules, Tex. Admin. Code, 37 TAC 35. Private Investigators and managers of Class A and Class C licenses with less than fifteen (15) years of continued registration as a private investigator or manager of a Class A or Class C license shall complete a total of eighteen (18) hours of continuing education, fourteen (14) of which must be in subject matter that relates to the type of registration held, two (2) hours of which must be over ethics, and two (2) hours of which must involve the review of Texas Occupations Code, Chapter 1702 and the Board's Administrative Rules, Tex. Admin. Code, 37 TAC 35.

(4) Any person registered as a private investigator who fails to complete the required [~~16 hours of~~] continuing education during the twenty-four [~~24~~] months of an initial registration is not eligible to make new or renewal application until such time as the training requirement for the previous registration period has been satisfied.

(5) Commissioned security officers and personal protection officers shall complete six (6) hours of continuing education. Continuing education for commissioned security officers and personal protection officers must be taught by schools and instructors approved by the board to instruct commissioned security officers as defined in §1702.1685 of the Act. Commissioned security officers shall submit a firearms proficiency certificate along with their renewal application.

(6) All registrants shall indicate they have completed the required minimum hours of board-approved continuing education credits on their application for renewal. A renewal application shall also include name of school, school number, seminar number, seminar date, and credits earned.

(7) Continuing education schools shall report attendees of continuing education classes to board within thirty (30) days of class completion. This report shall include the school number, instructor number, date and location of school. In addition to the following information for each participant: name, SSN and continuing education credit earned.

(8) During the first (1st) twenty-four (24) [~~24~~] months of initial registration each person employed as an alarm system installer or alarm systems salesperson must complete sixteen (16) [~~twenty (20)~~] hours of classroom instruction, as described in Chapter 1702, Texas Occupation Code. Any person employed as an alarm systems installer or alarm systems salesperson must obtain eight (8) [~~8~~] hours of continuing education credits in alarm related field during each subsequent twenty- four (24) [~~24~~] month period preceding the expiration date of registration in order to renew the registration.

(9) Any person licensed as an alarm systems installer or alarm systems salesperson who fails to complete 20 hours of training during the 24 months of initial licensure or who fails to complete 8 hours of continuing education during any subsequent licensing period is not eligible to make new or renewal application until such time as all training requirements for the previous license period have been satisfied.

(10) Alarm monitors shall complete four (4) hours of continuing education in subject matter that relates to the duties and responsibilities of an alarm monitor.

(11) The manager or his designee shall approve classes for continuing education that are determined to meet the qualifications of the Act and board rules.

(12) Any person licensed by the board as an alarm instructor shall be authorized to instruct all alarm continuing education courses approved by the board.

(13) Any person licensed by the board as a Level III or Level IV Instructor shall be authorized to instruct all continuing education courses approved by the board excluding alarm continuing education.

(b) Continuing education instructors shall provide a certificate of completion to each person successfully completing the continuing education course within 7 days after the date of course completion.

(1) The continuing education certificate of completion shall contain:

(A) the name and social security number of the person attending the course;

(B) the title and topic of the course;

(C) the number of hours of instruction provided;

(D) the signature of the instructor; and

(E) any information deemed necessary by the manager.

(2) The manager of a commissioned security officer training school conducting a continuing education course for commissioned security officers shall provide a certificate of completion to each person successfully completing the course within 7 days after the date the course was completed.

(3) The certificate of completion for commissioned security officers shall contain:

(A) the name and social security number of the person attending the course;

(B) the title and topic of the course;

(C) the number of hours of instruction provided;

(D) the signature of the instructor and school director; and

(E) any information deemed necessary by the manager.

(c) To receive board approval, a continuing education course shall contain instruction relating to one or more of the following:

(1) investigative procedures and practices;

(2) business practices;

(3) legal aspects of private investigation or private security;

(4) ethical aspects of private investigation or private security;

(5) handgun proficiency as defined under §1702.168 of the Act; and/or

(6) any other course of instruction approved by the manager.

(d) To receive board approval, a continuing education course shall contain at least one (1) clock hour of instruction.

(e) The manager shall approve courses for continuing education that are determined to meet the qualifications of these rules and the Act.

(1) Courses may be provided for and taught by any organization or person that, in the manager's discretion, has the education, knowledge and experience to provide such information.

(2) A person wishing to conduct a continuing education course must provide the manager a description of the contents of the curriculum and the qualifications of any instructor.

(3) The manager shall inform the person wishing to conduct the course of the approval or disapproval within 10 working days of receiving the request.

(4) The manager may delegate this responsibility to other employees of the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 28, 2006.

TRD-200603479
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 424-2135

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 7. TEXAS COUNCIL ON PURCHASING FROM PEOPLE WITH DISABILITIES

CHAPTER 189. PURCHASES OF PRODUCTS AND SERVICES FROM PEOPLE WITH DISABILITIES

40 TAC §189.6

The Texas Council on Purchasing from People with Disabilities (Council) proposes amendments to §189.6, concerning Criteria for Recognition and Approval of Community Rehabilitation Programs. The section name is changing from "Criteria for Recognition and Approval of Community Rehabilitation Programs" to "Certification and Re-Certification of Community Rehabilitation Programs".

During its rule review, published in the July 1, 2005, issue of the *Texas Register* (30 TexReg 3881), the Texas Council on Purchasing from People with Disabilities has reviewed and considered Texas Administrative Code, Title 40, §189.6 for readoption, revision, or repeal, in accordance with the Texas Government Code §2001.039 (Vernon 2000). The Council determined that 40 Texas Administrative Code §189.6, which governs certification and re-certification of community rehabilitation programs (CRPs), is also still necessary, but requires further substantive revision. In a concurrent miscellaneous notice, the Council announces its intent to readopt 40 Texas Administrative Code §189.6 with amendment. The amendment is proposed pursuant to the rulemaking authority granted to the Council in Texas Human Resources Code, §122.003(j) and §122.013(c)(2) (Vernon Supp. 2005).

The proposed amendment clarifies the statutory requirements and the Council's requirements related to eligibility to participate as a CRP in the State Use Program and applications for CRP certification and recertification. The proposed amendment permits the Council to delegate, to a central nonprofit agency, administrative duties related to the certification and recertification process; however the Council retains sole authority to vote on CRP applications or to take action regarding a CRP's continued participation in the State Use Program. The proposed amendment also explain in more detail required CRP recordkeeping. The proposed amendment further addresses the approval process of applications for CRP certification and recertification and retains the right to protest a recommendation of non-approval by the Council's Certification Subcommittee. The proposed amendment delineates required CRP reporting to a central nonprofit agency and to the Council. The proposed amendment discusses the Council's right to review a CRP's performance and compliance with the laws governing the State Use Program and the Council's right to suspend or revoke a CRP's certification. Finally, the proposed amendment emphasizes existing standards of conduct for CRPs during the application process and while certified to participate in the State Use Program.

Mr. John W. Luna, Chairman of the Council, has determined that for each year of the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Mr. Luna has also determined that for each year of the first five-year period the proposed rule is in effect the public will benefit from the clarification of eligibility and application requirements for CRPs.

Mr. Luna has also determined that there will be no effect on individuals or large, small, and micro-businesses as a result of the adoption of the proposed rule.

Mr. Luna has also determined that for each year of the first five-year period the proposed rule is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act, Texas Government Code, §2001.022 (Vernon Supp. 2005).

Interested persons may submit written comments on the proposal may be submitted to Rules Coordinator, Legal Services Division, Texas Building and Procurement Commission, P.O. Box 13047, Austin, TX 78711-3047. Comments may also be sent via email to: rulescomments@tbpc.state.tx.us. For comments submitted electronically, please include "Proposed Certification and Re-Certification of CRPs" in the subject line. Comments must be received no later than thirty days from the date of publication of the proposal to the *Texas Register*. Comments should be organized in a manner consistent with the organization of the proposed rule. Questions concerning this proposed amendment may be directed to Ms. Susan Maldonado at (512) 463-3960.

The amendment is proposed under Texas Human Resources Code, §122.003(j) and §122.013(c)(2), which require the Council to adopt rules to establish a process for the certification of CRPs.

The statutory provisions affected by the proposed rule are those set forth in Chapter 122 of the Texas Human Resources Code.

§189.6. Certification and Re-Certification [~~Criteria for Recognition and Approval~~] of Community Rehabilitation Programs.

(a) No applicant for certification may participate in the State Use Program prior to the Council's approval of certification.

(b) The Council may recognize programs that are accredited by national accepted vocational rehabilitation accrediting organizations and approve CRPs that have been approved by a state's habilitation or rehabilitation agency.

(c) The Council may delegate the administration of the certification process for CRPs to a CNA.

(d) [~~(a)~~] An applicant for [~~A~~] CRP certification must be a governmental entity; a public or private nonprofit unincorporated entity, which has its own nonprofit status and federal tax identification number and has among its purposes the employment of persons with disabilities to produce products or perform services for compensation;[~~,~~]or a public or private nonprofit incorporated entity with its own federal tax identification number, articles of incorporation and bylaws that state among its purposes the employment of [~~establish its existence for the primary purpose of employing~~] persons with disabilities to produce products or perform services for compensation.

(e) [~~(b)~~] A certified CRP must:

(1) maintain payroll, human resource functions, accounting, and all relevant documentation showing that the employees who produce products or perform services [~~of disability for people employed to produce goods or services~~] under the State Use Program are persons with disabilities; [~~state use program.~~]

(2) maintain records, including contracts with other entities, in accordance with generally accepted accounting principles, and all laws relevant to the records; and

(3) maintain any other records or documents required by the Council.

[~~(c) A CRP must maintain contracts and billing and payment records if it contracts with outside entities for services of any kind.~~]

[~~(d) Procedures for Certification~~]

[~~(1) To qualify for participation in the State Use Program under Human Resource Code Chapter 122, an~~]

(f) An applicant for certification must submit a completed [~~required~~] application and the required [~~following~~] documents to the Certification Subcommittee, through the CNA for the State Use Program [~~State Use Program's CNA, transmitted by a letter signed by an officer of the corporation, and/or chief administrator for the corporation~~]. Upon receipt, the CNA will verify the completeness and accuracy of the [~~each~~] application. No application will be considered without the following documents:

(1) [~~(A)~~] [~~A legible~~] copy of the IRS non-profit determination under Section 501(c)[~~(3)~~], when required by law; [~~.~~]

(2) [~~(B)~~] [~~A legible~~] copy of the Articles [~~Certification~~] of Incorporation issued [~~granted~~] by the Secretary of State, when required by law; [~~.~~]

[~~(C) A list of each service or product you propose to offer, and the location(s) where it will be produced.~~]

(3) [~~(D)~~] list of the [~~A roster of your~~] board of directors and officers with [~~, including~~] names, [~~and~~] addresses, and telephone numbers; [~~.~~]

(4) [~~(E)~~] [~~A legible~~] copy of the [~~your~~] organizational chart with job titles and names; [~~title.~~]

(5) [~~(F)~~] [~~A legible~~] copy of the [~~your~~] current liability insurance for the CRP; [~~each location where clients will be served.~~]

(6) [~~(G)~~] current [~~Current~~] fire inspection certificate, if required [~~awarded~~] by [~~the~~] city, county, or state regulations, [~~fire marshal~~] for each location where clients will be served or where persons with disabilities will be employed, or a statement of unavailability from the appropriate city, county, or state entity; [~~.~~]

(7) [~~(H)~~] [~~A legible~~] copy of the building inspection certificate or certificate of occupancy [~~certificate~~], if required by city, county, or state regulations [~~regulation~~], for each location where clients will be served or where persons with disabilities will be employed, or a statement of unavailability from the appropriate city, county, or state entity; [~~.~~]

(8) [~~(I)~~] copy of the wage [~~Wage~~] exemption certificate (WH-228)[~~,~~] if below minimum wages will be paid [~~you will be paying sub-minimum wages~~] to clients or to persons with disabilities who will be employed and a statement of explanation of circumstances requiring sub-minimum wages; and [~~.~~]

(9) [~~(J)~~] [~~A CRP must provide a~~] notarized statement that the CRP agrees to maintain compliance with the requirement that at least seventy-five percent (75%) of the CRP's total hours of direct labor necessary to perform services or reform raw materials, assemble components, manufacture, prepare, process and/or package products will be performed by persons with documented disabilities consistent with the following definition set forth in this Chapter: Disability--a mental or physical impairment, including blindness, that impedes a person who is seeking, entering, or maintaining gainful employment. A waiver may be granted only with Council approval.

(g) [~~(2)~~] The CNA will submit the [~~all new CRP's~~] completed application and required [~~necessary~~] documents to the Certification Subcommittee [~~of the Texas Council on Purchasing from People with Disabilities. The CNA will deliver a copy of the application to the Certification Subcommittee~~] not less than fifteen (15) days prior to the regularly scheduled Certification Subcommittee meeting.

[~~(A) The Certification Subcommittee is composed of three Council members appointed by the presiding officer to review applications of the Community Rehabilitation Programs.~~]

(h) [~~(B)~~] The Certification Subcommittee shall review each application and documentation and, if acceptable, forward its [~~the~~] recommendations to the Council for approval. Once approved, the Council will notify the CRP in writing [~~of their approved designation~~] and assign the CRP [~~present each with~~] a certification number. [~~Only the Council can approve eligibility. A CRP shall not participate in the State Use Program prior to the Council's certification.~~]

(i) [~~(C)~~] A CRP may protest a recommendation of non-approval [~~non-approval recommendation~~] at the next scheduled Certification Subcommittee meeting in accordance with the provisions of this Chapter.

(j) [~~(D)~~] [~~To maintain its certification, each CRP must meet the requirements as set forth in this chapter and Chapter 122 of the Human Resources Code.~~] Each CRP must be re-certified every three (3) years by the Council. The re-certification procedure will require submission of all previously requested documentation, a review of submitted reports to the CNA, and a determination that the CRP has maintained compliance with the stated requirements of the State Use Program and the rules as stated in the Texas Administrative Code, Title 40, Chapter 189. The [~~staff of the~~] Council shall establish a schedule for the re-certification [~~recertification~~] process and the [~~for all CRPs. The~~] CNA shall assist each CRP as necessary to attain re-certification. It is imperative that the CRP, after notification, submit within thirty (30) days the application for re-certification and required documents to the CNA. If the CRP fails to do so, the Council may request a written explanation and/or the appearance of a representative of the CRP before the Council. If the CRP fails to respond in a timely manner, the Council may consider the suspension of all State Use Program contracts until the re-certification process has been completed and approval has been attained [~~facilitate the recertification of the CRPs~~].

(k) The CRP will submit quarterly wage and hour reports to the CNA. These reports are due no later than the last day of the month following the end of the quarter. If the CRP fails to submit reports on

time, the Council will send a warning letter and a representative of the CRP may be requested to appear before the Council. If compliance is not achieved in a consistent and timely manner, the Council, at its discretion, may consider the suspension of the CRP's State Use Program contracts.

(l) It is imperative that CRPs maintain compliance with the State Use Program in regard to percentage requirements related to administrative costs, supplies cost, wages, and hours of direct labor necessary to perform services and/or produce products. Compliance will be monitored by the CNA and violations will be reported promptly to the Council. A violation will result in a warning letter from the Council and the CNA will offer assistance as needed to achieve compliance. A CRP that fails to meet compliance requirements, without a waiver from the Council, for two quarters in any four quarter period must submit a written explanation and a representative of the CRP will be requested to appear before the Council. State Use Program contracts may be suspended and/or certification revoked if compliance is not immediately and consistently maintained. In order to attain re-instatement, the CRP must apply for re-certification following the procedures outlined in this chapter.

[(e) The organization must not serve, in whole or in part, as an outlet or front for any entity whose primary purpose is not the employment of people with disabilities.]

[(f) The council may:]

[(1) recognize a CRP that maintains accreditation by a nationally accepted vocational rehabilitation accrediting organization, and]

[(2) approve CRP services that have been approved for a purchase by a state habilitation or rehabilitation agency.]

(m) [(g)] The Council [council], at its sole discretion, may review[,] or have reviewed[,] any CRP participating in the State Use Program [approved to participate in this program] to verify that the CRP meets and maintains the requirements outlined [the applicable qualifications contained] in this chapter. A CRP shall not submit any false statement relating to certification requirements, employment of and/or number of persons with disabilities, and nature and/or quality of products and services offered through the State Use Program. A CRP must not serve, in whole or part, as an outlet or front for any entity whose purpose is not the employment of people with disabilities. A CRP shall promptly report any conflict of interest or receipt of benefit or promise of benefit to the Council. The Council will consider such reports on an individual basis.

[(h)] Verified [Violation of any of the requirements of his chapter, or verified] instances of conflict of interest by a CRP may result in suspension of the [approval or in disapproval of a] CRP's eligibility to participate in the State Use Program [this program,] and/or revocation of certification [may result in suspension or disqualification of any product or service].

(n) [(i)] The Council, individual Council members, the State of Texas, or any other Texas state agency [Neither the council, nor any individual member, the State of Texas, nor any other Texas state agency] will not be responsible for any loss or losses, financial or otherwise, incurred by a [any] CRP should its product or services not be approved for the State Use Program [state use program] as provided by law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603557
John W. Luna
Chairman
Texas Council on Purchasing from People with Disabilities
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 463-3562

♦ ♦ ♦

TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 11. DESIGN

SUBCHAPTER C. ACCESS CONNECTIONS TO STATE HIGHWAYS

43 TAC §§11.50 - 11.52, 11.55, 11.56

The Texas Department of Transportation (department) proposes amendments to §§11.50 - 11.52, §11.55 and new §11.56 concerning access driveways to state highways.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTION

Transportation Code, Chapter 203 provides that the Texas Transportation Commission (commission) may lay out, construct, maintain, and operate a modern state highway system. Access management is one method of preserving the substantial investment in the ground transportation system by preserving the roadway level of service.

Due to the significant cost associated with the construction and maintenance of highways, it is imperative that the highway system provide maximum traffic handling capacity and reasonable access for as long as practical. Adjacent development and uncontrolled access points along highways can contribute to congestion and early deterioration of the operation of the highway, thereby reducing the ability of the state highway system to safely and efficiently move higher volumes of traffic.

Access management is an engineering and planning method of balancing the needs of mobility and safety on a highway system with the needs of access to adjacent land. Access management can significantly enhance traffic safety by reducing traffic accidents, personal injury, and property damage. Access management promotes a more coordinated intergovernmental, long term approach to land use and transportation decisions in the context of quality of life, economic development, livable communities, and public safety.

Existing §§11.50 - 11.55 provide the current regulations for access driveways to state highways. Section 11.50 describes the purpose and need for access management. Section 11.51 includes definitions for public, commercial and private access driveways. Section 11.52 outlines the delegation of access permit authority to municipalities. Section 11.53 outlines the procedures for new access connection requests where the adjacent property has no existing right of access. Section 11.54 provides for the construction and maintenance of access connection facilities. Section 11.55 describes the procedures for the restoration of access using local access roads.

Section 11.50 is amended to clarify those prior commitments that will qualify specific access connection requests for exceptions.

Section 11.51 is amended to include definitions for "eligible counties," "executive director," and "regionally significant highways," and revisions to the definitions of "local access management plan" and "public driveway."

Transportation Code, §203.032 authorizes a county with a population of 3.3 million or more or a county adjacent to a county with a population of 3.3 million or more to adopt certain access-related orders applicable to state highways. Section 11.52 is amended to include eligible counties in the delegation of access permit authority. In addition, subsection 11.52(f) is amended to require compliance with the department's environmental review rules to address those situations in which federal law does not allow the department to delegate its environmental review requirements.

To expedite the process for providing local access roads, §11.55 is amended to change approval from the commission to the executive director for the department to enter into agreements to provide local access roads in conjunction with department projects.

New §11.56 is added to provide a uniform means by which public and private entities with the authority to construct, maintain, and operate regionally significant highway facilities may obtain permission to connect those facilities to the state highway system. While most such entities are required to obtain commission approval to construct regionally significant highways, certain entities with independent authority may construct regionally significant highways that do not necessarily conform to the Transportation Improvement Program (TIP). Adding regionally significant highways that are not in the TIP, especially in non-attainment areas, can threaten the entire area's transportation conformity under the federal Clean Air Act, resulting in sanctions that could severely hamper the state's federal highway program. The current rules govern connection to the state highway system, but do not give the department the ability to deny connections based on these conformity concerns, design and construction issues, or noncompliance with federal requirements. This new rule will ensure that proper statewide planning is employed in the construction of major highway facilities that connect to the state highway system, that the facilities are properly designed and constructed in compliance with federal laws, and that environmental impacts are adequately considered.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments and new section as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments and new section. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Mark A. Marek, Director, Design Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments and new section.

PUBLIC BENEFIT

Mr. Marek has also determined that for each year of the first five years the amendments and new section are in effect, the public benefits anticipated as a result of enforcing or administering the amendments and new section will be improved safety, mobility, and efficiency due to a more coordinated approach to land use and transportation decisions. There will be no adverse effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments and new section may be submitted to Mark A. Marek, Director, Design Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on August 14, 2006.

STATUTORY AUTHORITY

The amendments and new section are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically Transportation Code, §203.032, which provides the commission with the authority to control access to highways.

CROSS REFERENCE TO STATUTE

Transportation Code, §203.032.

§11.50. Access Management.

(a) Purpose and need. Access management is an engineering and planning method of balancing the needs of mobility and safety on a highway system with the needs of access to adjacent land uses. Access management is one method of preserving the substantial public investment in the ground transportation system by preserving the roadway level of service. Further, access management can significantly enhance traffic safety by reducing traffic accidents, personal injury, and property damage. It has been noted that access management practices can promote a more coordinated intergovernmental, long term approach to land use and transportation decisions in the context of quality of life, economic development, livable communities, and public safety. Given the benefits to the ground transportation system and public safety, it is the intention of the department to promote the use of access management on the state highway system.

(b) Applicability. This subchapter applies to all new access connections constructed on highways on the state highway system. It also applies to existing access connections that may be reconstructed or otherwise modified as part of a department project.

(c) Effective date. The provisions of this subchapter are effective January 1, 2004.

(d) Transition period. Exceptions [~~Prior to January 1, 2005, exceptions~~] to the provisions of this subchapter may be granted for specific access connection requests where significant prior commitments have been made, prior to January 1, 2005, based on previous department policy.

§11.51. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Access connection--Facility for entry and/or exit such as a driveway, street, road, or highway that connects to a highway on the state highway system.

(2) Commercial driveway--An entrance to, or exit from, any commercial, business, or similar type establishment.

(3) Commission--The Texas Transportation Commission.

(4) Department--The Texas Department of Transportation.

(5) Eligible county--a county with a population of 3.3 million or more or a county adjacent to a county with a population of 3.3 million or more.

(6) [~~(5)~~] Engineering study--An appropriate level of analysis as determined by the department, which may include a traffic impact analysis, that determines the expected impact that permitting access will have on mobility, safety, and the efficient operation of the state highway system.

(7) Executive director--the executive director of the department, or a designee not below the level of deputy executive director or assistant executive director.

(8) [~~(6)~~] Local access management plan--A plan or guideline in a formally adopted [~~municipality~~] rule or ordinance that is related to the application of access management within the municipality's or eligible county's jurisdiction.

(9) [~~(7)~~] Local access road--A local public street or road, generally one parallel to a highway on the state highway system to which access for businesses or properties located between the highway and the local access road is provided as a substitute for access to the highway. A local access road may also be called a lateral road or reverse frontage road, depending on individual location and application.

(10) [~~(8)~~] Permittee--A property owner or its authorized representative who receives an access connection permit from the department to construct or modify an access connection from the property to a highway on the state highway system.

(11) [~~(9)~~] Private driveway--An entrance to or exit from a residential dwelling, farm, or ranch for the exclusive use and benefit of the permittee.

(12) [~~(10)~~] Public driveway--An approach from a publicly [~~county or city~~] maintained road or street or an entrance or exit from a public school, a publicly owned cemetery, or other publicly owned places or buildings that provide for public access.

(13) Regionally significant highway--A highway functionally classified as a minor arterial or higher.

(14) [~~(11)~~] Traffic impact analysis--A traffic engineering study to the level of analysis determined by the department that determines the potential current and future traffic impacts of a proposed traffic generator and is signed, sealed, and dated by an engineer licensed to practice in the state [~~State~~] of Texas.

§11.52. Delegation of Access Permit Authority to Municipalities or Eligible Counties.

(a) Intent. Except as provided in §11.56 of this subchapter (relating to Connection with Regionally Significant Highway, a [~~A~~] municipality or eligible county may include highways on the state highway system in its local access management plan. The intent of the department is to allow municipalities or eligible counties, upon request, to assume responsibility for issuing permits for access connections to state highways within the jurisdiction of the municipality or eligible county under a local access management plan when the municipality or eligible county has the ability to issue permits.

(b) Precedence. A local access management plan supersedes an order of the commission under Transportation Code, §203.031(a)(2) or (4) to the extent that they conflict, unless:

(1) the United States Department of Transportation Federal Highway Administration notifies the department that enforcement of the local access management plan would impair the ability of the state or the department to receive funds for highway construction or maintenance from the federal government; or

(2) the department owns the access rights.

(c) Application. The department will apply a local access management plan under this section when the municipality or eligible county provides its local access management plan to the department with an indication of its desire that the plan be applied within its jurisdiction and an implementation date. The department will implement any subsequent changes to the local access management plan when the municipality or eligible county submits the changes to the department with a proposed implementation date for the changes.

(d) Local access permitting function. A municipality or eligible county that desires to undertake the access permitting process on highways on the state highway system shall submit its proposed permitting procedures to the department. If the department determines that the proposed procedures adequately address the requirements in subsection (f) of this section, it will transfer to the municipality or eligible county the access permitting function within the municipality's or eligible county's jurisdiction. The municipality or eligible county shall submit to the department a copy of each approved access permit on the state highway system within ten working days of its approval.

(e) Assumption of permitting function optional. Municipalities or eligible counties are not required to take over the access permitting function for state highways within their jurisdiction.

(f) Engineering. Granting access location permit authority to municipalities or eligible counties does not preclude the need to properly engineer access locations. Any impacts to drainage or hydraulics on highways on the state highway system resulting from access connections must be coordinated with the department prior to any local access approval. Issuance of access permits by a municipality or eligible county must address driveway geometrics, utility location or relocation, compliance with the Americans with Disabilities Act (ADA) and Texas Accessibility Standards (TAS), [~~environmental requirements, wetland considerations if appropriate,~~] and all other applicable state and federal laws, rules, and regulations. In addition, each access connection must comply with the applicable environmental review requirements in Chapter 2 of this title (relating to Environmental Policy).

§11.55. Local Access Roads.

(a) If local access roads are necessary to restore circulation or to resolve a landlocked [~~landlock~~] condition on a remaining parcel of land, or will otherwise benefit the state highway system, local access roads may be included in a department project on a standard participation basis as established in Appendix A of §15.55 of this title (relating to Construction Cost Participation).

(b) Except as provided in §11.56 of this subchapter (relating to Connection with Regionally Significant Highway), executive director [~~Commission~~] approval must be obtained prior to the department entering into any agreements to provide local access roads in conjunction with a department project.

(c) Local access roads will not be considered service projects as defined in §15.56 of this title (relating to Local Financing of Highway Improvement Projects on the State Highway System).

§11.56. Connection with Regionally Significant Highway.

(a) Purpose. A public or private entity may not connect a regionally significant highway to a segment of the state highway system without the approval of the commission. This section prescribes the procedure by which the commission will consider approval.

(b) Request. An entity seeking approval under this section shall send a written request to the executive director. The request shall include a detailed schematic indicating the location of interchanges and mainlanes.

(c) Approval criteria.

(1) The commission will approve a connection requested under this section if:

(A) the highway is identified in a conforming Transportation Improvement Program;

(B) the requestor agrees to design and construct the project in compliance with subsection (d) of this section; and

(C) the requestor agrees to conduct public involvement and a study of the social, environmental, and economic impacts of the project in compliance with subsection (e) of this section.

(2) The commission may waive the requirements of paragraph (1)(B) of this subsection as they apply to the portion of the project that is not the connection if the commission determines that the past performance of the requestor on previous projects developed in collaboration with the department indicates that the requestor will design and construct a safe and durable highway. For purposes of this paragraph, the term "connection" includes an overpass, underpass, intersection, and interchange.

(3) The commission may waive the requirements of paragraph (1)(C) of this subsection if the commission determines that the requestor has a written policy that adequately provides for:

(A) public involvement, including public hearings on an environmental review;

(B) an evaluation of direct and indirect effects of the highway project;

(C) analysis of project alternatives; and

(D) a written report that briefly explains the requestor's decision on the project and that specifies the measures to mitigate environmental harm on which the project is conditioned.

(d) Design and construction. Except as provided in subsection (c)(2) of this section, the requestor shall design and construct the highway in accordance with §26.33(d), (f), and (g)-(1) of this title (relating to Design and Construction). For purposes of this subsection, the term RMA as used in §26.33 shall mean the requestor.

(e) Environmental review and public involvement.

(1) Environmental documentation.

(A) Subject to paragraph (4) of this subsection, a requestor shall prepare an environmental document in accordance with Chapter 2, Subchapter C, of this title (relating to Environmental Review and Public Involvement for Transportation Projects).

(B) The environmental document must describe all reasonable and feasible measures to avoid, minimize, or mitigate for adverse environmental impacts and all practicable measures to enhance the environment.

(C) The form and content of an environmental document prepared by a requestor and any decision by a requestor that an environmental impact statement is not necessary must be approved by the department.

(2) Public involvement. Subject to paragraph (4) of this subsection, a requestor shall provide for public involvement by:

(A) complying with §2.43(c) of this title (relating to Non Federal-Aid Transportation Projects);

(B) holding one or more public hearings following the completion of the studies required by this section as may be necessary to ensure participation by each community affected by the project; and

(C) notifying the department in writing not less than ten days in advance of all public meetings and public hearings held under this section.

(3) Revision to environmental document. Following the public hearing, a requestor shall revise the environmental document showing the proposed changes in the project location, design, and mitigation as a result of comments and the public involvement process for the project to address any issues or concerns identified during the public involvement process.

(4) Respective roles and responsibilities. The requestor shall request that the department make a determination of the respective roles and responsibilities of the requestor and the department under Chapter 2, Subchapter C, of this title (relating to Environmental Review and Public Involvement for Transportation Projects). The requestor shall comply with the department's directives. The directives will specify who will conduct the following work, the requestor or the department:

(A) preparation and completion of environmental studies;

(B) submission of appropriate environmental documentation for department review;

(C) preparation of any document revisions;

(D) submission of copies of the environmental studies and documentation adequate for distribution;

(E) preparation of legal and public notices for department review and use;

(F) arrangements for appropriate public involvement, including court reporters and accommodations if requested for persons with special communication or physical needs related to public hearings;

(G) preparation of public meetings and hearing materials;

(H) preparation of any responses to comments;

(I) preparation of public meeting and public hearing summary and analysis, and the comment and response reports; and

(J) submission of documentation showing all environmental permits, issues, and commitments have been or will be completed, including copies of permits or other approvals required prior to construction.

(5) Record. Subject to paragraph (4) of this subsection, a requestor shall provide the department:

(A) the appropriate environmental document;

(B) summary and comment and response reports for all meetings;

(C) summary and analysis and comment and response reports for all public hearings;

(D) a summary of the proposed changes in the project location and design and mitigation planned as a result of comments;

(E) the verbatim transcript of any public hearing;

(F) certification that all public hearings were held in accordance with §2.43 of this title (relating to Non Federal-Aid Transportation Projects), the Civil Rights Act of 1964, and the Civil Rights Restoration Act of 1987; and

(G) revised environmental document showing the proposed changes in project location, design, and mitigation as a result of comments and public involvement.

(6) This subsection does not apply if the commission has approved a waiver under subsection (c)(3) of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603533
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 463-8683

♦ ♦ ♦

CHAPTER 17. VEHICLE TITLES AND REGISTRATION

SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §17.28

The Texas Department of Transportation (department) proposes amendments to §17.28, concerning specialty license plates, symbols, tabs, and other devices.

Transportation Code, §504.801 authorizes the department to create new specialty license plates, either on its own initiative or upon receipt of an application from an organization or individual. In 2004, administrative rules were adopted for the implementation of Transportation Code, §504.801. These amendments revise §17.28(i), Development of new specialty license plates, to clarify the procedures for the specialty license plate committee (committee), the application process, and issuance of new specialty license plates.

Throughout the proposed rule, nonsubstantive changes in language are made to correct terminology and enhance readability.

Section 17.28(i)(1)(A) is amended to specify that the committee shall review all completed specialty license plate applications. Applications that are not complete will not be considered by the committee.

Section 17.28(i)(1)(C) is added to provide the criteria the committee will utilize for recommending a proposed specialty license plate.

Section 17.28(i)(1)(D) is amended to require posting on the department's website of the proposed specialty license plates recommended by the committee. The number of days for a proposed specialty license plate to be posted for public comment period is amended from 30 to 10 days. These timeframes establish consistency with Transportation Code, §504.851, Contract with Private Vendor. The license plate design is also added to the website notice.

New §17.28(i)(1)(E) is added to specify that specialty license plate applications that are restricted to certain individuals or groups of individuals (qualifying plates) will be reviewed by the committee utilizing the same procedures as applications submitted for plates that are available to everyone (non-qualifying plates).

Section 17.28(i)(2)(A) is amended to list the items that are required as part of the application. The new language clarifies that the certification for the not-for-profit status must be on a form provided by the Internal Revenue Service on that department's letterhead.

The amendments also provide that the application needs to identify the projected sales and a marketing plan for the plate. The department has found it difficult to adequately review applications if the application only includes an estimate of potential plate sales. By requiring the applicant to include information regarding their marketing plan and information on the types or groups of individuals that will be interested in purchasing the plate, the department will be better able to determine if the projected sales will meet the deposit requirement.

The new language also requires the signature of the executive director of the sponsoring state agency. This requirement is to insure the sponsoring agency is fully aware of their participation in the program. In addition, the letter must state that the funds will be used for a lawful purpose.

Section 17.28(i)(2)(B) is amended to clarify the application process. The amended language requires that the committee has the authority to request additional information if necessary to make a decision on the application. Further, the new language requires that if additional information is requested the decision on the application will be postponed until the next committee meeting. If the additional information is not received the application will be considered incomplete and will not be reviewed by the committee. The executive director is the final approval authority of a specialty license plate application and the criteria on which the decision is based is identified. An applicant whose application is not approved by the executive director must submit a new application to be considered again by the committee. The committee will no longer hold applications and continue to review those held applications in each successive meeting.

Section 17.28(i)(3) is amended to specify that the department has the final approval of all specialty license plate designs.

Section 17.28(i)(4) language pertaining to the redesign of specialty license plates is amended to require the redesign to go through the application and approval process. An approved redesign will not require the $15,000 deposit as required by Transportation Code, §504.702. The redesign does however require the payment of administrative costs associated with the redesign.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in affect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments. There are no anticipated economic costs for persons required to comply with the section as proposed.

Rebecca Davio, Director, Vehicle Titles and Registration Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT

Ms. Davio has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be providing non-profit entities the policies and procedures necessary for obtaining a specialty license plate for their organization and thus enhancing the customer service level of the department. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Rebecca Davio, Director, Vehicle Titles and Registration Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on August 14, 2006.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §504.004, which allows the department to adopt rules to administer Transportation Code, Chapter 504, governing the issuance of specialty license plates.

CROSS REFERENCE TO STATUTE

Transportation Code, §504.801.

§17.28. Specialty License Plates, Symbols, Tabs, and Other Devices.

(a) - (h) (No change.)

(i) Development of new specialty license plates.

(1) Procedure. The following procedure governs the process of authorizing [~~issuance of~~] new specialty license plates under Transportation Code, §504.801. It applies whether the new license plate originated as a result of an application or on the department's own initiative.

(A) The executive director will appoint no fewer than three employees of the department to a specialty license plate committee. The [~~license plate~~] committee shall meet at least once every six months and shall review all completed specialty license plate applications [~~tentatively decide to issue or not issue all proposed specialty license plates~~].

(B) The [~~license plate~~] committee may request additional information from an applicant if necessary to reach a [~~the additional information would be relevant to the~~] decision [~~whether or not to issue the proposed license plate~~].

(C) The recommendation of the committee will be based on the following:

(i) the projected sales of the license plate as demonstrated in the marketing plan and by the listing of target purchasers;

(ii) compliance with Transportation Code, §504.801; and

(iii) other information provided during the application process.

(D) [~~(B)~~] If the [~~license plate~~] committee recommends the issuance of [~~tentatively decides to issue~~] a proposed specialty license plate, notice of the proposed new license plate will be published in the *Texas Register* and the license plate design will be posted on the department's web site to receive public [~~for~~] comment. Comments must be received 10 days from the date the notice is published in the *Texas Register* [~~The comment period shall be no less than 30 days~~].

[~~(C) If the license plate committee tentatively decides not to issue a proposed specialty license plate, the director of the Vehicle Titles and Registration Division shall forward the committee's tentative decision to the executive director or the executive director's designee, who will decide not to issue the proposed specialty license plate or will decide tentatively to issue the proposed specialty license plate. If the decision is tentatively made to issue the proposed specialty license plate, notice will be published in the *Texas Register* and the department's web site under subparagraph (B) of this paragraph.~~]

[~~(D) After notice of a proposed specialty license plate is published and the comment period has expired, the director will make a recommendation to the executive director or the executive director's designee, who will decide whether to issue the proposed license plate.~~]

(E) Specialty license plate applications that are restricted to certain individuals or groups of individuals (qualifying plates) will be reviewed by the committee using the same procedures as applications submitted for plates that are available to everyone (non-qualifying plates). The limited number of potential purchasers will be a factor in the approval decision.

(2) Applications for the creation of new specialty license plates.

(A) Requirements. To apply for the creation of a new specialty license plate, an applicant must submit a written application [~~. The application must be~~] on a form approved by the director. The application shall include [~~and include, at a minimum~~]:

(i) the applicant's name, address, telephone number, and other identifying information as directed on the form;

(ii) a current certification provided by the Internal Revenue Service on that department's letterhead, stating that the applicant is a not-for-profit enterprise; [~~and~~]

(iii) a draft design of the specialty license plate;[~~.~~]

(iv) projected sales of the plate, including an explanation of how the projected figure was established;

(v) a marketing plan for the plate including a description of the target market;

[~~(B) Optional information. An applicant for the creation of a new specialty license plate may also include:~~]

[(i) ~~a proposed distribution of fees; and~~]

(vi) [~~(ii)~~] a letter from the executive director of the [~~a~~] sponsoring state agency stating that the agency agrees to receive and distribute revenues from the specialty license plate and that the use of the funds will not violate a statute or constitutional provision; and

(vii) other information necessary for the committee to reach a decision regarding approval of the requested specialty plate.

(B) [~~(C)~~] Application Process [~~Procedure~~].

(i) The application must be complete to be considered by the committee [~~to create a new specialty license plate must be submitted on a form prescribed by the director~~].

(ii) If the committee reviews an application and determines that additional information is needed from the applicant that may contribute to the application decision, the decision on the application will be postponed until the next committee meeting.

(iii) If the additional requested information is not received prior to the next committee meeting the application will not be considered and will be returned to the applicant as incomplete.

(iv) The executive director will make the final decision on the specialty license plate application based on the committee's recommendation and the comments received during the posting period.

(v) An applicant whose application is not approved by the executive director must submit a new application and supporting documentation to be considered again by the committee.

(3) Issuance of specialty plates.

(A) If the specialty license plate is approved [~~If the department decides to issue the new specialty license plate~~], the applicant must comply with Transportation Code, §504.702[~~,~~] before any further design and processing of the license plate.

(B) Approval of the plate does not guarantee that the submitted draft plate design will be used. The department has final approval of all specialty license plate designs and can adjust or reconfigure the submitted draft design to comply with the format of the license plate specifications.

(4) [~~(3)~~] Redesign of specialty license plate.

(A) At the request of the original or subsequent applicant, the department may redesign a specialty license plate.

(B) A request for a new design will go through the application and approval process required by this subsection.

(C) An approved license plate redesign does not require the full deposit required by Transportation Code, §504.702.

(D) The original or subsequent applicant will pay a [~~all~~] redesign cost to cover administrative expenses [~~costs~~]. [~~The department's decision will be based on the cost to the public of redesigning the license plate and will consider the amount of any preprinted sheeting remaining and other administrative costs.~~]

(j) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603534
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 463-8683

♦ ♦ ♦

CHAPTER 18. MOTOR CARRIERS

The Texas Department of Transportation (department) proposes amendments to §18.2, §18.13, §18.14, §18.16, and §18.32 concerning motor carrier definitions, registration, records, and inspections.

EXPLANATION OF PROPOSED AMENDMENTS

The proposed amendments are necessary to implement the provisions of House Bill 2702 of the 79th Legislature, Regular Session, 2005. House Bill 2702, Article 6, amended Transportation Code, §643.051, Registration Requirements, to require all household good movers to register as motor carriers regardless of the weight of the vehicles they operate. The bill also deleted the alternative registration requirements for household goods carriers under Transportation Code, §643.153, Motor Carriers Transporting Household Goods. All household goods carriers must now register under the general motor carrier registration regardless of the size of vehicles they operate. The statutory changes eliminated the need for "Type A" and "Type B" household goods carrier classifications.

These amendments were initially proposed November 17, 2005, along with other rules regarding motor carrier registration issues. These amendments were removed from the rules as adopted during the April 27, 2006, Texas Transportation Commission (commission) meeting to allow the department time to further study the issue of minimum vehicle liability insurance requirements for household goods carriers who operate vehicles weighing 26,000 pounds or less. However, due to a clerical error the language filed with the *Texas Register* on April 28, 2006, for §18.16(a) Figure 1 was not amended to reflect the language adopted by the commission. The language in Figure 1, regarding the minimum liability insurance level for household goods carriers under 26,000 pounds was not approved by the commission and is not being enforced by the department. The language now being proposed for Figure 1 is the same language that is currently published in 43 TAC §18.16(a).

To study the minimum liability insurance issues, the department has contacted other states, gathered insurance information, reviewed traffic accident studies, contacted the Texas Department of Public Safety and the Department of Insurance regarding vehicle loss records, contacted the Federal Motor Carrier Safety Administration concerning crash data, collected data from the National Institute for Occupational Safety and Health and Insurance Institute for Highway Safety, and conducted a public hearing. The information gathered from these resources was used to draft these proposed amendments.

Throughout the proposed rules, all references to "Type A" and "Type B" household goods carriers are deleted.

The definition for "Type B" household goods carrier has been deleted from §18.2 as it is no longer necessary under Transportation Code, Chapter 643.

Amended language in §18.13(i) deletes the reference to the alternative registration process for Type B carriers. These alternatives are no longer authorized by the statute due to the changes in Transportation Code, §643.051 and §643.153.

Section 18.16(a), relating to automobile liability insurance requirements, is amended to establish a minimum liability insurance requirement for vehicles weighing 26,000 pounds or less that are operated by household goods carriers as required by the statutory changes. Transportation Code, §643.101 requires that a motor carrier required to register under Subchapter B shall maintain liability insurance in an amount set by the department for each vehicle requiring registration the carrier operates. Pursuant to Transportation Code, §643.101(b), the department is to consider the class and size of the vehicle and the persons or cargo transported in setting the insurance requirement. The rules set the minimum level of liability insurance for household goods carriers with gross weight of 26,000 pounds or less at $300,000 combined single limit (CSL). This figure was selected based on the research conducted by the Motor Carrier Division, which is summarized below.

In 1995 the department required motor carriers to maintain a minimum liability insurance of $500,000 CSL for commercial vehicles over 26,000 pounds operated in Texas. Household goods carriers operating vehicles 26,000 pounds or less were not required to register as motor carriers under the same provisions

and therefore, the department was not required to establish a minimum insurance requirement. These types of household goods carriers were required to maintain the minimum liability insurance levels required of all vehicles under Transportation Code, §601.072. Transportation Code, §601.007 exempts vehicles that are required to register under Transportation Code, §643.051 from the liability requirements of Transportation Code, Chapter 601.

Pursuant to Transportation Code, Chapter 601, the state mandated minimum insurance coverage for vehicles that are not required to register under the motor carrier provisions is $20,000 for bodily injury or death to one person, $40,000 for bodily injury or death to two or more persons, and $15,000 for property damage. This minimum level of insurance is inadequate for a regulated commercial activity.

A look at 16 states revealed that only Florida has lower requirements than the current liability insurance limit for household goods carriers weighing 26,000 pounds or less. Several states have set their minimum limits by using the existing federal requirements. The federal regulations found at 49 CFR §387.303 set the minimum vehicle liability insurance amounts for motor carriers operating in interstate commerce by weight of the vehicle. The federal regulations require vehicles weighing under 10,000 pounds to have a minimum of $300,000 CSL. Vehicles weighing over 10,000 pounds have a minimum federal limit of $750,000 CSL. The department's proposed rule that requires household goods carriers operating vehicles weighing 26,000 pounds or less, intrastate only, to carry a $300,000 CSL liability insurance policy complies with the state statute which mandates that the minimum liability levels not exceed the federal requirements.

Large amounts of crash data are available, but the department was unable to find any accident rate studies specific to household goods carriers; therefore, very limited financial loss information is available. National statistics between 1975-2004 support that vehicles weighing 26,000 pounds or less incur as high an incident rate as do the larger trucks. The Insurance Institute for Highway Safety shows that while the death rate for occupants in passenger cars has declined 12% in the last 30 years the death rate for occupants in light trucks has increased 57%. This indicates that light trucks are involved in serious accidents that result in significant loss to the injured party. The existing minimum liability insurance requirements of Transportation Code, §601.072, are not sufficient to cover the costs of the at-fault party involved in a serous accident.

As stated the language setting the minimum liability insurance at $300,000 was incorrectly included in the adoption filed April 28, 2006. This amendment proposes the same language and provides the justification for how the minimum liability insurance level was selected.

Proposed amendments to §18.32(c) delete information regarding where and how Type B household goods carriers must carry registration certificates.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years the amendments as proposed are in effect, there will be minimal fiscal implications for state or local governments as a result of enforcing or administering the amendments. There may be a moderate economic cost for persons required to comply with the sections as proposed. The fiscal impact is due to the establishment of a new minimum liability insurance requirement as required by recently enacted legislation.

The possible economic cost to persons who are required to comply with the rule as proposed will be as follows. It is anticipated that, during the next five fiscal years, annual liability insurance premiums will be approximately 39% higher than the current rates. This figure is based on estimates the department received from insurance agents questioned during the drafting of the proposed amendments. Due to the many factors that affect insurance premiums it is difficult to give a firm premium figure. Some of the factors used to set the insurance premium include: location, type of vehicle, loss history, financial strength, longevity of the business, and safety procedures. Each of these factors can have a substantial impact to either decrease or increase the actual premium, therefore, the department's estimate of 39% will not necessarily translate to the cost of the additional insurance for the entities required to comply with these provisions. In addition, it is unknown if these entities currently carry only the minimum liability insurance required. The department received information during the public hearing that many household goods carriers maintained liability insurance in amounts above that required by rule.

Carol Davis, Director, Motor Carrier Division, has certified that there will be no impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT

Ms. Davis has also determined that for each of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be the implementation of the legislation referenced in this preamble and increased protection to the traveling public. The costs involved for those involved in vehicle accidents include medical expenses and property damage. Additional insurance coverage is needed to offset the potential economic loss to the general public involved in an accident with household goods carriers.

There will be a moderate economic effect on small businesses. The department has reviewed the requirements of Government Code, §2006.002 and has determined that it is not feasible, considering the purpose of the statute under which these rules are proposed, to reduce the effect on small and micro-businesses. Transportation Code, §643.051 was amended to require all household goods carriers comply with the same motor carrier registration requirements. To provide an alternative reporting system, establish a separate compliance process, or exempt small and micro businesses from the requirements would be in effect returning to the process in place prior to the statutory change.

The insurance estimates obtained by the department show a $367 increase in the annual liability premium per vehicle as a result of raising the minimum requirement from $55,000 CSL to $300,000 CSL. Based on this figure the department has determined that a household goods carrier operating three vehicles weighing 26,000 pounds or less will have an approximately $1,100 annual increase in liability insurance premiums. A household goods carrier operating seven vehicles weighing 26,000 pounds or less will have an approximately $2,600 annual increase and a carrier with twenty-five vehicles will have an approximately $9,200 annual increase in premiums.

The cost of complying with the provisions of this rule will affect both large and small businesses. The costs were estimated on the insurance premium for each vehicle operated by the com-

pany. Large companies operating vehicles that weigh 26,000 pounds or less will likely see the highest increase in costs.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on August 1, 2006, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Randall Dillard, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the amendments may be submitted to Carol Davis, Director, Motor Carrier Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on August 14, 2006.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §18.2

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §643.003, which authorizes the department to adopt rules to administer Chapter 643 regarding motor carrier registration.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 643.

§18.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Approved association--A group of household goods carriers, its agents, or both, that has an approved collective ratemaking agreement on file with the department under §18.64 of this chapter.

(2) Binding proposal--A formal written offer stating the exact price for the transportation of specified household goods and any related services.

(3) Certificate of insurance--A certificate prescribed by and filed with the department in which an insurance carrier or surety company warrants that a motor carrier for whom the certificate is filed has the minimum coverage as required by §18.16 and §18.86 of this chapter.

(4) Certificate of registration--A certificate issued by the department to a motor carrier and containing a unique number.

(5) Certified scale--Any scale designed for weighing motor vehicles, including trailers or semitrailers not attached to a tractor, and certified by an authorized scale inspection and licensing authority. A certified scale may also be a platform-type or warehouse-type scale properly inspected and certified.

(6) Commercial motor vehicle--

(A) Includes:

(i) any motor vehicle or combination of vehicles with a gross weight, registered weight, or gross weight rating in excess of 26,000 pounds, that is designed or used for the transportation of cargo in furtherance of any commercial enterprise;

(ii) all tow trucks, regardless of the gross weight rating of the tow truck;

(iii) any vehicle, including buses, designed or used to transport more than 15 passengers, including the driver;

(iv) any vehicle used in the transportation of hazardous materials in a quantity requiring placarding under the regulations issued under the federal Hazardous Materials Transportation Act (49 USC, App. §§1801-1813);

(v) a commercial motor vehicle, as defined by 49 CFR §390.5, owned or controlled by a person or entity that is domiciled in or a citizen of a country other than the United States; and

(vi) any vehicle transporting household goods for compensation, regardless of the gross weight rating, registered weight or gross weight.

(B) Does not include:

(i) a farm vehicle with a gross weight, registered weight, and gross weight rating of less than 48,000 pounds;

(ii) cotton vehicles registered under Transportation Code, §504.505;

(iii) a vehicle registered with the Railroad Commission under [~~Texas~~] Natural Resources Code, §113.131 and §116.072;

(iv) a vehicle transporting liquor under a private carrier permit issued in accordance with Alcoholic Beverage Code, Chapter 42;

(v) a motor vehicle used to transport passengers and operated by an entity whose primary function is not the transportation of passengers, such as a vehicle operated by a hotel, day-care center, public or private school, nursing home, or similar organization;

(vi) a motor vehicle registered under the Single State Registration System established under 49 USC §14504 when operating exclusively in interstate or international commerce; and

(vii) a vehicle operated by a governmental entity.

(7) Commercial school bus--A motor vehicle owned by a motor carrier that is:

(A) registered under Transportation Code, Chapter 643, Subchapter B;

(B) operated exclusively within the boundaries of a municipality and used to transport preprimary, primary, or secondary school students on a route between the students' residences and a public, private, or parochial school or daycare facility;

(C) operated by a person who holds a driver's license or commercial driver's license of the appropriate class for the operation of a school bus;

(D) complies with Transportation Code, Chapter 548; and

(E) complies with Transportation Code, §521.022.

(8) Commission--The Texas Transportation Commission.

(9) Consent tow--Any tow of a motor vehicle initiated by the owner or operator of the vehicle or by a person who has possession, custody, or control of the vehicle. The term does not include a tow of a motor vehicle initiated by a peace officer investigating a traffic accident or a traffic incident that involves the vehicle.

(10) Conspicuous--Written in a size, color, and contrast so as to be readily noticed and understood.

(11) Conversion--A change in an entity's organization that is implemented with a Certificate of Conversion issued by the Texas Secretary of State under Texas Business Corporation Act, Article 5.18.

(12) Department--Texas Department of Transportation.

(13) Director--The director of the Motor Carrier Division, Texas Department of Transportation.

(14) Division--The Motor Carrier Division.

(15) DOI--Texas Department of Insurance.

(16) Estimate--An informal oral calculation of the approximate price of transporting household goods.

(17) Farmer--A person who operates a farm or is directly involved in cultivating land or in raising crops or livestock that are owned by or are under the direct control of that person.

(18) Farm vehicle--Any vehicle or combination of vehicles controlled or operated by a farmer or rancher being used to transport agriculture products, farm machinery, and farm supplies to or from a farm or ranch.

(19) Gross weight rating--The maximum loaded weight of any combination of truck, tractor, and trailer equipment as specified by the manufacturer of the equipment. If the manufacturer's rating is unknown, the gross weight rating is the greater of:

(A) the actual weight of the equipment and its lading; or

(B) the maximum lawful weight of the equipment and its lading.

(20) Household goods--Personal property intended ultimately to be used in a dwelling when the transportation of that property is arranged and paid for by the householder or the householder's representative. The term does not include personal property to be used in a dwelling when the property is transported from a manufacturing, retail, or similar company to a dwelling if the transportation is arranged by a manufacturing, retail, or similar company.

(21) Household goods agent--A motor carrier who transports household goods on behalf of another motor carrier.

(22) Household goods carrier--A motor carrier who transports household goods for compensation or hire in furtherance of a commercial enterprise.

(23) Insurer--A person, including a surety, authorized in this state to write lines of insurance coverage required by Subchapter B and Subchapter G of this chapter.

(24) Inventory--A list of the items in a household goods shipment and the condition of the items.

(25) Leasing business--A person that leases vehicles requiring registration under Subchapter B of this chapter to a motor carrier that must be registered.

(26) Manager--The manager of the department's Motor Carrier Division, Motor Carrier Operations Section.

(27) Mediation--A non-adversarial form of alternative dispute resolution in which an impartial person, the mediator, facilitates communication between two parties to promote reconciliation, settlement, or understanding.

(28) Motor Carrier or carrier--A person that controls, operates, or directs the operation of one or more vehicles that transport persons or cargo over a public highway in this state.

(29) Motor transportation broker--A person who sells, offers for sale, or negotiates for the transportation of cargo by a motor carrier operated by another person or a person who aids and abets another person in selling, offering for sale, or negotiating for the transportation of cargo by a motor carrier operated by another person.

(30) Moving services contract--A contract between a household goods carrier and shipper, such as a bill of lading, receipt, order for service, or work order, that sets out the terms of the services to be provided.

(31) Multiple user--An individual or business who has a contract with a household goods carrier and who used the carrier's services more than 50 times within the preceding 12 months.

(32) Nonconsent tow--Any tow of a motor vehicle that is not a consent tow.

(33) Not-to-exceed proposal--A formal written offer stating the maximum price a shipper can be required to pay for the transportation of specified household goods and any related services. The offer may also state the non-binding approximate price. Any offer based on hourly rates must state the maximum number of hours required for the transportation and related services unless there is an acknowledgment from the shipper that the number of hours is not necessary.

(34) Principal place of business--A single location that serves as a motor carrier's headquarters and where it maintains its operational records or can make them available.

(35) Public highway--Any publicly owned and maintained street, road, or highway in this state.

(36) Reasonable dispatch--The performance of transportation, other than transportation provided under guaranteed service dates, during the period of time agreed on by the carrier and the shipper and shown on the shipment documentation. This definition does not affect the availability to the carrier of the defense of force majeure.

(37) Registration receipt--A receipt issued to the registrant by its registration state after the requirements of 49 CFR[,] Part 367 have been met.

(38) Registration state--A state where the registrant maintains a valid single state registration as defined in 49 CFR[,] Part 367.

(39) Replacement vehicle--A vehicle that takes the place of another vehicle that has been removed from service.

(40) Revocation--The withdrawal of registration and privileges by the department or a registration state.

(41) Shipper--The owner of household goods or the owner's representative.

(42) Short-term lease--A lease of 30 days or less.

(43) Single state registration system--The program established by 49 USC §14504.

(44) SOAH--The State Office of Administrative Hearings.

(45) State of travel--A state in which a motor carrier operates motor vehicles subject to the single state registration system.

(46) Substitute vehicle--A vehicle that is leased from a leasing business and that is used as a temporary replacement for a vehicle that has been taken out of service for maintenance, repair, or any other reason causing the temporary unavailability of the permanent vehicle.

(47) Suspension--Temporary removal of privileges granted to a registrant by the department or a registration state.

(48) Towing company--A motor carrier that transports vehicles using a tow truck.

(49) Tow--The utilization of a mechanical device used to winch or otherwise move another vehicle.

(50) Tow truck--A motor vehicle equipped with or used in combination with a mechanical device used to tow, winch, or otherwise move another vehicle. The following motor vehicles are not considered tow trucks:

(A) a motor vehicle owned and used exclusively by a governmental entity, including a public school district;

(B) a motor vehicle towing:

(i) a race car;

(ii) a motor vehicle for exhibition; or

(iii) an antique motor vehicle;

(C) a recreational vehicle towing another vehicle;

(D) a motor vehicle used in combination with a tow bar, tow dolly, or other mechanical device if the vehicle is not operated in the furtherance of a commercial enterprise; or

(E) a motor vehicle that is controlled or operated by a farmer or rancher and that is used for towing a farm vehicle.

[~~(51) Type B household goods carrier--A household goods carrier that does not use a motor vehicle or combination of vehicles with a gross weight, registered weight, or gross weight rating in excess of 26,000 pounds.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603535
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 463-8683

♦ ♦ ♦

SUBCHAPTER B. MOTOR CARRIER REGISTRATION

43 TAC §§18.13, 18.14, 18.16

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §643.003, which authorizes the department to adopt rules to administer Chapter 643 regarding motor carrier registration.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 643.

§18.13. Application for Motor Carrier Registration.

(a) Form of application. An application for motor carrier registration must be filed with the department's Motor Carrier Division and [~~except as provided in subsection (i) of this section,~~] must be in the form prescribed by the director and must contain, at a minimum, the following information.

(1) Business or trade name. The applicant must designate the business or trade name of the motor carrier.

(2) Owner name. If the motor carrier is a sole proprietorship, the owner must indicate the name and social security number of the owner. A partnership must indicate the partners' names, and a corporation must indicate principal officers and titles.

(3) Principal place of business. A motor carrier must disclose the motor carrier's principal business address. If the mailing address is different from the principal business address, the mailing address must also be disclosed.

(4) Legal Agent.

(A) A Texas-domiciled motor carrier must provide the name and address of a legal agent for service of process if the agent is different from the motor carrier.

(B) A motor carrier domiciled outside Texas must provide the name and Texas address of the legal agent for service of process.

(C) A legal agent for service of process shall be a Texas resident, a domestic corporation, or a foreign corporation authorized to transact business in Texas with a Texas address for service of process.

(5) Description of vehicles. An application must include a motor carrier equipment report identifying each commercial motor vehicle that requires registration and that the carrier proposes to operate. Each commercial motor vehicle must be identified by its motor vehicle identification number, make, model year, and type of cargo and by the unit number assigned to the commercial motor vehicle by the motor carrier. Any subsequent registration of vehicles must be made under subsection (e) of this section.

(6) Type of motor carrier operations. An applicant must state if the applicant:

(A) proposes to transport passengers, household goods, or hazardous materials;

(B) is a tow truck company that performs nonconsent tows; or

(C) is domiciled in a foreign country.

(7) Insurance coverage. An applicant must indicate insurance coverage as required by §18.16 of this subchapter.

(8) Safety affidavit. Each motor carrier must complete, as part of the application, an affidavit stating that the motor carrier knows and will conduct operations in accordance with all federal and state safety regulations.

(9) Drug-testing certification. Each motor carrier must certify, as part of the application, that the motor carrier is in compliance with the drug-testing requirements of 49 C.F.R. Part 382.

(A) Drug-testing consortium participants. If the motor carrier belongs to a consortium, as defined by 49 C.F.R. Part 382, the applicant must provide the names of the persons operating the consortium.

(B) Report of positive result. A motor carrier required to register under this section shall report to the Department of Public Safety, in the manner required by the Department of Public Safety, a valid positive result on a controlled substances test performed as part of the carrier's drug testing program on an employee of the carrier who holds a commercial driver's license under Transportation Code, Chapter 522. The term "employee" as used in this subparagraph includes all employees as defined in Title 49, Code of Federal Regulations, Part 40.3.

(10) Duration of registration. An applicant must indicate the duration of the desired registration. Registration may be for seven calendar days or for 90 days, one year, or two years. The duration of registration chosen by the applicant will be applied to all vehicles. Household goods carriers may not obtain seven day or 90 day certificates of registration.

(11) Additional requirements. The following fees and information must be submitted with all applications.

(A) An application must be accompanied by an application fee of:

(i) $100 for annual and biennial registrations;

(ii) $25 for 90 day registrations; or

(iii) $5 for seven day registrations.

(B) An application must be accompanied by a vehicle registration fee of:

(i) $10 for each vehicle, other than a tow truck, requiring registration or $25 for each tow truck that the motor carrier proposes to operate under a seven day, 90 day, or annual registration; or

(ii) $20 for each vehicle, other than a tow truck, requiring registration or $50 for each tow truck that the motor carrier proposes to operate under a biennial registration.

(C) An application must be accompanied by proof of insurance or financial responsibility and insurance filing fee as required by §18.16 of this subchapter.

(D) An application must be accompanied by any other information required by law.

(12) Application of fees. Applicants who have paid vehicle fees under §18.17 of this subchapter may request that the department apply those fees to the carrier's motor carrier registration. The request must be accompanied by a copy of the Single State Registration receipt. On review of the Single State Registration receipt, the department will apply fees paid under the Single State Registration System as follows.

(A) The per vehicle fees paid by the applicant will be applied on a per vehicle basis toward the vehicle fees that the applicant owes for the vehicles registered under motor carrier registration.

(B) Vehicle fees will be applied only to the first year of registration if an applicant applies for a biennial motor carrier registration. The motor carrier must pay all vehicle fees for the second year.

(b) Incomplete applications. The director will return an application to the applicant if it is not accompanied by all fees and by proof of insurance or financial responsibility.

(c) Conditional acceptance of application. The director may conditionally accept an application if it is accompanied by all fees and by proof of insurance or financial responsibility, but is not accompanied by all required information. Conditional acceptance in no way constitutes approval of the application. The director will notify the applicant of any information necessary to complete the application. If the applicant does not supply all necessary information within 45 days from notification by the director, the application will be considered withdrawn and all fees will be retained.

(d) Disposition of application.

(1) Approval. An applicant meeting the requirements of this section and whose registration is approved will be issued the following documents.

(A) Certificate of registration. The department will issue a certificate of registration. The certificate of registration will contain the name and address of the motor carrier and a single registration number, regardless of the number of vehicles requiring registration that the carrier operates.

(B) Insurance cab card. The department will issue an original insurance cab card listing all vehicles to be operated under the carrier's certificate of registration. The insurance cab card shall be continuously maintained at the registrant's principal place of business. The insurance cab card will be valid for the same period as the motor carrier's certificate of registration and will contain information regarding each vehicle registered by the motor carrier. [~~This subparagraph does not apply to Type B household goods carriers.~~]

(i) A copy of the page of the insurance cab card on which the vehicle is shown shall be maintained in each vehicle listed. The appropriate information concerning that vehicle shall be highlighted. The insurance cab card will serve as proof of insurance as long as the motor carrier has continuous insurance or financial responsibility on file with the department.

(ii) On demand by a department-certified inspector or any other authorized government personnel, the driver shall present the highlighted page of the insurance cab card that is maintained in the vehicle.

(iii) The carrier shall notify the department in writing if it discontinues use of a registered commercial motor vehicle before the expiration of its insurance cab card.

(iv) Any erasure, alteration, or unauthorized use of an insurance cab card renders it void.

(v) If an original insurance cab card is lost, stolen, destroyed, or mutilated, if it becomes illegible, or if it otherwise requires replacement, a new insurance cab card will be issued by the department at the request of the motor carrier.

(vi) Registration listings previously issued by the department will remain valid until expiration or renewal or until revoked or suspended by the department.

(2) Denial. The department may deny a registration if the applicant had a registration revoked under §18.72 of this chapter.

(e) Additional and Replacement Vehicles. A motor carrier required to obtain a certificate of registration under this section shall not operate additional vehicles unless the carrier identifies the vehicles on a form prescribed by the director and pays applicable fees as described in this subsection.

(1) Additional vehicles. To add a vehicle, a motor carrier must pay a fee of $10 for each additional vehicle, other than a tow truck, or $25 for each tow truck that the motor carrier proposes to operate under a seven day, 90 day, or annual registration. To add a vehicle during the first year of a biennial registration, a motor carrier must pay a fee of $20 for each vehicle, other than a tow truck, or $50 for each tow truck. To add a vehicle during the second year of a biennial registration, a motor carrier must pay a fee of $10 for each vehicle, other than a tow truck, or $25 for each tow truck.

(2) Replacement vehicles. No fee is required for a vehicle that is replacing a vehicle for which the fee was previously paid. Before the replacement vehicle is put into operation, the motor carrier shall notify the department, identify the vehicle being taken out of service, and identify the replacement vehicle on a form prescribed by the department. A motor carrier registered under seven day registration may not replace vehicles.

(3) Fees paid under the Single State Registration System. Vehicle fees paid under §18.17 of this subchapter will be applied toward a motor carrier's vehicle fees under subsection (a)(12) of this section.

(f) Supplement to original application. A motor carrier required to register under this section shall submit a supplemental application under the following circumstances.

(1) Change of cargo. A registered motor carrier may not begin transporting household goods or hazardous materials, or performing nonconsent tows, unless the carrier submits a supplemental application to the department and shows the department evidence of insurance or financial responsibility in the amounts specified by §18.16 of this subchapter.

(2) Change of name. A motor carrier that changes its name shall file a supplemental application for registration no later than the effective date of the change. The motor carrier shall include evidence of insurance or financial responsibility in the new name and in the amounts specified by §18.16 of this subchapter. A motor carrier that is a corporation must have its name change approved by the Texas Secretary of State before filing a supplemental application. A motor carrier incorporated outside the state [~~State~~] of Texas must complete the name change under the law of its state of incorporation before filing a supplemental application.

(3) Change of address or legal agent for service of process. A motor carrier shall file a supplemental application for any change of address or any change of its legal agent for service of process no later than the effective date of the change. The address most recently filed will be presumed conclusively to be the current address.

(4) Change in principal officers and titles. A motor carrier that is a corporation shall file a supplemental application for any change in the principal officers and titles no later than the effective date of the change.

(5) Conversion of corporate structure. A motor carrier that has successfully completed a corporate conversion involving a change in the name of the corporation shall file a supplemental application for registration and evidence of insurance or financial responsibility reflecting the new company name. The conversion must be approved by the Texas Secretary of State before the supplemental application is filed.

(6) Change in drug-testing consortium status. A motor carrier that changes consortium status shall file a supplemental application that includes the names of the persons operating the consortium.

(7) Retaining a revoked or suspended certificate of registration number. A motor carrier may retain a prior certificate of registration number by:

(A) filing a supplemental application to re-register instead of filing an original application; and

(B) providing adequate evidence that the carrier has satisfactorily resolved the facts that gave rise to the suspension or revocation.

(g) Change of ownership. A motor carrier must file an original application for registration when there is a corporate merger or a change in the ownership of a sole proprietorship or of a partnership.

(h) Alternative vehicle registration for household goods agents. To avoid multiple registrations of a commercial motor vehicle, a household goods agent's vehicles may be registered under the motor carrier's certificate of registration under this subsection.

(1) The carrier must notify the department on a form approved by the director of its intent to register its agent's vehicles under this subsection.

(2) When a carrier registers vehicles under this subsection, the carrier's certificate will include all vehicles registered under its agent's certificates of registration. The carrier must register under its certificate of registration all vehicles operated on its behalf that do not appear on its agent's certificate of registration.

(3) The department may send the carrier a copy of any notification sent to the agent concerning circumstances that could lead to denial, suspension, or revocation of the agent's certificate.

[~~(i) Type B household goods carriers. An application for motor carrier registration submitted by a Type B household goods carrier shall be in the form prescribed by the director.~~]

[~~(1) The carrier's application must contain all the information described in subsection (a) of this section, except for the information specified in subsection (a)(5) and (7) of this section.~~]

[~~(2) The carrier's application must be accompanied by a $100 application fee.~~]

[~~(3) The carrier's application must be accompanied by proof of financial responsibility for cargo loss or damage and by the filing fee specified in §18.16 of this subchapter.~~]

[~~(4) The carrier's application must include a statement certifying that the carrier:~~]

[~~(A) is in compliance with Transportation Code, Chapter 601; and~~]

[~~(B) if the carrier maintains an automobile liability insurance policy to comply with Transportation Code, Chapter 601, then~~

the policy is an enforceable commercial or business automobile liability insurance policy.]

[(5) The department will issue an original certificate of registration, which must be continuously maintained at the registrant's principal place of business.]

[(6) A carrier shall carry a copy of its certificate of registration either in the cab of each vehicle or in each trailer used for the transportation of household goods.]

[(7) The carrier shall notify the department in writing when it discontinues operations as a transporter of household goods.]

[(8) On demand by a department-certified inspector or any other authorized government personnel, the driver shall present the certificate of registration maintained in the vehicle.]

[(9) The certificate of registration is continuously in effect until suspended or revoked by the department. A motor carrier may voluntarily cancel the certificate of registration by submitting a supplemental application or written request.]

[(10) Any erasure, alteration, or unauthorized use of a certificate of registration renders it void.]

(i) [(j)] Substitute vehicles leased from leasing businesses. A registered motor carrier is not required to comply with the provisions of subsection (e) of this section for a substitute vehicle leased from a business registered under §18.19 of this subchapter. A motor carrier is not required to carry proof of registration as described in subsection (d) of this section if a copy of the lease agreement for the originally leased vehicle is carried in the cab of the temporary replacement vehicle.

§18.14. Expiration and Renewal of Commercial Motor Vehicle Registration.

(a) Expiration and renewal dates.

(1) A motor carrier with annual or biennial registration[, other than a Type B household goods carrier,] will be assigned a date for the expiration and renewal of its motor carrier registration according to the last digit of the carrier's certificate of registration number, as outlined in the following chart:
Figure: 43 TAC §18.14(a)(1) (No change.)

[(2) Certificates of registration for Type B household goods carriers remain in effect until suspended or revoked.]

(2) [(3)] 90 day certificates of registration are valid for 90 calendar days from the effective date.

(3) [(4)] Seven day certificates of registration are valid for seven calendar days from the effective date.

(b) Registration renewal.

(1) Approximately 60 days before the expiration of registration, the department will mail or send electronically a renewal notice to each registered motor carrier with annual or biennial registration[, other than a Type B household goods carrier]. The notice will be mailed to the carrier's last known address according to the division's records. Failure to receive the notice does not relieve the registrant of the responsibility to renew. A motor carrier must ensure that the department receives the renewal at least 15 days prior to the renewal date specified in subsection (a) of this section. A supplement to an application for motor carrier registration renewal must:

(A) supply any new information required under §18.13(f) of this subchapter if the information has not previously been supplied to the department;

(B) include a $10 fee for each vehicle, other than a tow truck, requiring registration or $25 for each tow truck that the carrier operates under an annual certificate of registration and a $20 fee for each vehicle, other than a tow truck, requiring registration or $50 for each tow truck that the carrier operates under a biennial certificate of registration; and

(C) include a copy of the Single State Registration receipt when requesting that vehicle fees paid under §18.17 of this subchapter be applied toward the fees specified by this subsection.

(2) Seven day and 90 day registrations may not be renewed.

(3) A motor carrier shall maintain continuous insurance or evidence of financial responsibility in an amount at least equal to the amount prescribed under §18.16 of this subchapter.

(4) The insurance cab card issued to a motor carrier is valid for the same period as the motor carrier's certificate of registration.

(5) To renew registration after it has expired, a motor carrier must identify its vehicles on a form prescribed by the director, pay all vehicle fees, and if current proof of insurance is not on file with the division, meet all insurance requirements.

§18.16. Insurance Requirements.

(a) Automobile liability insurance requirements.

[(1)] A motor carrier[, other than a Type B household goods carrier,] must file proof of commercial automobile liability insurance with the department on a form acceptable to the director for each vehicle required to be registered under this subchapter. The motor carrier must carry and maintain automobile liability insurance that is combined single limit liability for bodily injury to or death of an individual per occurrence, loss or damage to property (excluding cargo) per occurrence, or both. Extraneous information will not be considered acceptable, and the department may reject proof of commercial automobile liability insurance if it is provided in a format that includes information beyond what is required. Minimum insurance levels are indicated in the following table.
[Figure: 43 TAC §18.16(a)(1)]
Figure: 43 TAC §18.16(a)

[(2) Type B household goods carriers shall comply with the applicable requirements of Transportation Code, Chapter 601. If a Type B household goods carrier maintains an automobile liability insurance policy to comply with Transportation Code, Chapter 601, the policy must be an enforceable commercial or business automobile liability insurance policy.]

(b) Cargo insurance.

(1) Household goods carriers shall file and maintain with the department proof of financial responsibility.

(A) The minimum limits of financial responsibility for a household goods carrier for hire is $5,000 for loss or damage to a single shipper's cargo carried on any one motor vehicle.

(B) The minimum limits of financial responsibility for a household goods carrier for hire is $10,000 for aggregate loss or damage to multiple shipper cargo carried on any one motor vehicle. In cases in which multiple shippers sustain damage and the aggregate amount of cargo damage is greater than the cargo insurance in force, the insurance company shall prorate the benefits among the shippers in relationship to the damage incurred by each shipper.

(2) Tow truck company performing nonconsent tows. A tow truck company that performs nonconsent tows shall file and maintain with the department proof of financial responsibility for on-hook cargo. The minimum level of financial responsibility for each regis-

tered vehicle performing nonconsent tows will be in the amount of at least $50,000.

(c) Workers' compensation or accidental insurance coverage.

(1) A motor carrier that is required to register under this subchapter and whose primary business is transportation for compensation or hire between two or more incorporated cities, towns, or villages shall provide workers' compensation for all its employees or accidental insurance coverage in the amounts prescribed in paragraph (2) of this subsection.

(2) Accidental insurance coverage required by paragraph (1) of this subsection shall be at least in the following amounts:

(A) $300,000 for medical expenses and coverage for at least 104 weeks;

(B) $100,000 for accidental death and dismemberment, including 70% of employee's pre-injury income for not less than 104 weeks when compensating for loss of income; and

(C) $500 for the maximum weekly benefit.

(d) Qualification of motor carrier as self-insured.

(1) General qualifications. A motor carrier may meet the insurance requirements of subsections (a) and (b) of this section by filing an application, in a form prescribed by the department, to qualify as a self-insured. The application must include a true and accurate statement of the motor carrier's financial condition and other evidence that establishes its ability to satisfy obligations for bodily injury and property damage liability without affecting the stability or permanency of its business. The department may accept United States Department of Transportation evidence of the motor carrier's qualifications as a self-insured.

(2) Adopted final orders. The department adopts all final orders of the Railroad Commission of Texas to the extent that they concern self-insurance and were in effect on August 31, 1995. Those final orders are continued in effect until changed by order of the department.

(3) Applicant guidelines. In addition to filing an application as prescribed by the department, an applicant for self-insured status must submit materials that will allow the department to determine the following information.

(A) Applicant's net worth. An applicant's net worth must be adequate in relation to the size of its operations and the extent of its request for self-insurance authority. The applicant must demonstrate that it can and will maintain an adequate net worth.

(B) Self-insurance program. An applicant must demonstrate that it has established and will maintain a sound insurance program that will protect the public against all claims involving motor vehicles to the same extent as the minimum security limits applicable under this section. In determining whether an applicant is maintaining a sound insurance program, the department will consider:

(i) reserves;

(ii) sinking funds;

(iii) third-party financial guarantees;

(iv) parent company or affiliate sureties;

(v) excess insurance coverage; and

(vi) other appropriate aspects of the applicant's program.

(C) Safety program. An applicant must submit evidence of substantial compliance with the Federal Motor Carrier Safety Regulations as adopted by the Texas Department of Public Safety and with Transportation Code, Chapter 644.

(4) Other securities or agreements. The department may accept an application for approval of a security or agreement if satisfied that the security or agreement offered will adequately protect the public.

(5) Periodic reports. An applicant shall file annual statements, semi-annual and quarterly reports, and any other reports required by the department reflecting the applicant's financial condition and the status of its self-insurance program while the motor carrier is self-insured.

(6) Duration of self-insured status. The department may approve an applicant as a self-insured for any specific time or for an indefinite time.

(7) Revocation of self-insured status. On receiving evidence that a self-insured motor carrier's financial condition has changed, that its safety program or record is inadequate, or that it is otherwise not in compliance with this subchapter, the department may at any time require the self-insured to provide additional information. On 10 days notice from the department, the self-insured shall appear and demonstrate that it continues to have adequate financial resources to pay all claims involving motor vehicles for bodily injury and property damage liability. The self-insured shall also demonstrate that it remains in compliance with the requirements of this section and of any active self-insurance orders issued or adopted by the department. If an applicant fails to comply with this paragraph, its self-insured status may be revoked.

(8) Appeal. An applicant may appeal a denial or revocation of self-insurance status by filing a petition for an administrative hearing in accordance with §§1.21 et seq. of this title (relating to Procedures in Contested Cases).

(e) Filing proof of insurance with the department.

(1) Forms.

(A) A motor carrier[~~, other than a Type B household goods carrier,~~] shall file and maintain proof of automobile liability insurance for all vehicles required to be registered under this subchapter at all times. This proof shall be filed on a form acceptable to the director.

(B) A household goods carrier shall file and maintain proof of cargo insurance for its cargo at all times. This proof shall be on a form acceptable to the director.

(C) A tow truck company that performs nonconsent tows shall file and maintain with the department proof of on-hook cargo insurance for all nonconsent tows. This proof shall be on a form acceptable to the director.

(2) Filing proof of insurance and financial responsibility. A motor carrier's insurance or surety company, bank, or other financial institution shall file and maintain proof of insurance or financial responsibility on a form acceptable to the director:

(A) at the time of the original application for motor carrier certificate of registration;

(B) on or before the cancellation date of the insurance coverage as described in subsection (f) of this section;

(C) when the motor carrier changes insurers;

(D) when the motor carrier asks to retain the certificate number of a revoked certificate of registration;

(E) when the motor carrier changes its name under §18.13(f)(2) of this subchapter;

(F) when the motor carrier, under subsection (a) of this section, changes the classification of the cargo being transported; and

(G) when replacing another active insurance filing.

(3) Filing fee. Each certificate of insurance or proof of financial responsibility filed with the department for the coverage required under this section shall be accompanied by a nonrefundable filing fee of $100. This fee applies both when the carrier submits an original application and when the carrier submits a supplemental application when retaining a revoked certificate of registration number.

(4) Acceptable filings. The department will not accept an insurance policy or certificate of insurance unless it is issued by an insurance company licensed and authorized to do business in the state [~~State~~] of Texas. It must be in a form prescribed or approved by the DOI and signed or countersigned by an authorized agent of the insurance company. The department will accept a certificate of insurance issued by a surplus lines insurer that meets the requirements of Insurance Code, Article 1.14-2, and rules adopted by the DOI under that article.

(f) Cancellation of insurance coverage. Except when replaced by another acceptable form of insurance coverage or proof of financial responsibility approved by the department, no insurance coverage shall be canceled or withdrawn until 30 days after notice has been given to the department by the insurance company in a form approved by the department. Nonetheless, proof of insurance coverage for a seven day or 90 day certificate of registration may be canceled by the insurance company without 30 days notice if the certificate of registration is expired, suspended, or revoked, and the insurance company provides a cancellation date on the proof of insurance coverage. The department will revoke a certificate of registration under §18.72 of this chapter for failure to maintain proof of current insurance.

(g) Replacement insurance filing. The department will consider a new insurance filing as the current record of financial responsibility required by this section if:

(1) the new insurance filing is received by the department; and

(2) a cancellation notice has not been received for previous insurance filings.

(h) Insolvency of insurance carrier. If the insurer of a motor carrier becomes insolvent or becomes involved in a receivership or other insolvency proceeding, the motor carrier must file an affidavit with the department. The affidavit must be executed by an owner, partner, or officer of the motor carrier and show that:

(1) no accidents have occurred and no claims have arisen during the insolvency of the insurance carrier; or

(2) all claims have been satisfied.

(i) Notifications. The department shall notify the Texas Department of Public Safety and other law enforcement agencies of each motor carrier whose certificate of registration has been revoked for failing to maintain liability insurance coverage.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603536

Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 463-8683

♦ ♦ ♦

SUBCHAPTER C. RECORDS AND INSPECTIONS

43 TAC §18.32

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §643.003, which authorizes the department to adopt rules to administer Chapter 643 regarding motor carrier registration.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 643.

§18.32. Motor Carrier Records.

(a) General records to be maintained. Every motor carrier shall prepare and maintain at its principal place of business in Texas:

(1) operational logs, insurance certificates, and documents to verify the carrier's operations;

(2) complete and accurate records of services performed;

(3) all certificate of title documents, weight tickets, permits for oversize or overweight vehicles and loads, dispatch records, tow tickets, or any other document that would verify the operations of the vehicle to determine the actual weight, insurance coverage, size, and/or capacity of the vehicle;

(4) documents supporting fee payments and the original registration receipts issued by the department for an interstate carrier registered under §18.17 of this chapter (relating to Single State Registration System), for a period of at least three years; and

(5) the original certificate of registration and registration listing, if applicable.

(b) Additional records for household goods carriers. In order to verify compliance with Subchapters B and E of this chapter, every household goods carrier shall retain complete and accurate records maintained in accordance with reasonable accounting procedures of all services performed in intrastate commerce. Household goods carriers shall retain all of the following information and documents:

(1) moving services contracts, such as, bills of lading or receipts;

(2) proposals for moving services;

(3) inventories, if applicable;

(4) freight bills;

(5) time cards, trip sheets, or driver's logs;

(6) claim records;

(7) ledgers and journals;

(8) canceled checks;

(9) bank statements and deposit slips;

(10) invoices, vouchers or statements supporting disbursements; and

(11) dispatch records.

(c) Proof of motor carrier registration.

(1) Except as provided in paragraph [~~paragraphs (1) and~~] (2) of this subsection, every motor carrier shall maintain a copy of its current registration listing in the cab of each registered vehicle at all times. A motor carrier shall make available to a certified inspector or any law enforcement officer a copy of the current registration listing upon request.

[~~(1) A Type B household goods carrier shall maintain a copy of its certificate of registration in either the cab of each power unit or each trailer operated on its behalf at all times. A Type B household goods carrier shall make available and accessible to a certified inspector or any law enforcement officer a copy of the current certificate of registration.~~]

(2) A registered motor carrier is not required to carry proof of registration in a vehicle leased from a leasing business that is registered under §18.19 of this chapter (relating to Short-term Lease and Substitute Vehicles), when leased as a temporary replacement due to maintenance, repair, or other unavailability of the originally leased vehicle. A copy of the lease agreement, or the lease for the originally leased vehicle, in the case of a substitute vehicle, must be carried in the cab of the vehicle.

(d) Location of files. Except as provided in paragraphs (1) and (2) of this subsection, every motor carrier shall maintain at a principal office in Texas all records and information required by the department.

(1) Texas firms. If a motor carrier wishes to maintain records at a location other than its principal office in Texas, the motor carrier shall make a written request to the manager. A motor carrier may not begin maintaining records at an alternate location until the request is approved by the manager.

(2) Out-of-state firms. A motor carrier whose principal business address is located outside the state of Texas shall maintain records required under this section at its principal office in Texas. Alternatively, a motor carrier may maintain such records at an out-of-state facility if the carrier reimburses the department for necessary travel expenses and per diem for any inspections or investigations conducted in accordance with §18.31 of this subchapter.

(3) A motor carrier that performs nonconsent tows shall maintain a current towing fee schedule, as prescribed in Subchapter H of this chapter (relating to Nonconsent Towing Fees Schedule), at all vehicle storage facilities where vehicles are delivered.

(e) Preservation and destruction of records. All books and records generated by a motor carrier, except driver's time cards and logs, must be maintained for not less than two years at the motor carrier's principal business address. A motor carrier must maintain driver's time cards and logs for not less than six months at the carrier's principal business address.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603537
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 13, 2006
For further information, please call: (512) 463-8683

♦ ♦ ♦

WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 7. BANKING AND SECURITIES

PART 8. JOINT FINANCIAL REGULATORY AGENCIES

CHAPTER 153. HOME EQUITY LENDING

7 TAC §153.22

The Finance Commission of Texas and the Texas Credit Union Commission withdraws the proposed new §153.22 which appeared in the March 3, 2006, issue of the *Texas Register* (31 TexReg 1393).

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603560
Leslie L. Pettijohn
Commissioner
Joint Financial Regulatory Agencies
Effective date: June 30, 2006
For further information, please call: (512) 936-7622

♦ ♦ ♦

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

SUBCHAPTER C. UTILIZATION REVIEW

1 TAC §371.204, §371.208

The Health and Human Services Commission (HHSC) adopts amendments to §371.204 and §371.208, relating the Hospital Screening Criteria for Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select II Contract Reviews and Appeals Related to Utilization Review Department Review Decisions. The amendments to §371.204 and §371.208 are adopted without changes to the proposed text as published in the May 12, 2006, issue of the *Texas Register* (31 TexReg 3763) and will not be republished.

Section 371.204 establishes new criteria for utilization reviews of inpatient hospital stays because the existing "physician-developed and physician-approved inpatient hospital" criteria are no longer available for use.

Section 371.208 clarifies the HHSC section responsible for reviewing appeals related to utilization review decisions.

A public hearing was held on May 24, 2006, at 2:00 p.m. in the Lone Star Conference Room at 11209 Metric Boulevard, Building H, Austin, Texas. No comments were received during the comment period.

The amendments are adopted under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the Texas Medicaid program; and Government Code §2001.006, which allows state agencies to adopt rules in preparation for the implementation of legislation. HHSC has the authority to obtain any information or technology necessary to enable the office to meet its responsibilities under §531.102(a), relating to Office of Inspector General.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603527

Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: August 1, 2006
Proposal publication date: May 12, 2006
For further information, please call: (512) 424-6900

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER J. COSTS, RATES AND TARIFFS

DIVISION 2. RECOVERY OF STRANDED COSTS

16 TAC §25.263

The Public Utility Commission of Texas (commission) adopts an amendment to §25.263, relating to True-Up Proceeding, with changes to the text as published in the January 27, 2006 *Texas Register* (31 TexReg 453). The adopted amendment establishes a new method for calculating carrying costs (interest) on true-up balances that a transmission and distribution utility is permitted to recover through rates but has not securitized. The adopted amendment results in a lower interest rate for unsecuritized true-up balances. This adopted rule is a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 32008 is assigned to this proceeding.

The commission received written comments and/or reply comments on the proposed new section from American Electric Power Company (AEP); CenterPoint Energy Houston Electric, LLC (CNP); Office of Public Utility Counsel (OPC); Texas Industrial Energy Consumers (TIEC); Texas-New Mexico Power Company (TNMP); and Texas Coalition of Cities for Utility Issues and Cities Served by Texas-New Mexico Power Company (collectively "Cities").

A public hearing on this rule was held at the commission's offices on March 1, 2006.

Comments and Reply Comments

Appropriate Interest Rate

AEP, CNP, and TNMP all commented that the utility's debt rate is inappropriate for carrying costs on unsecuritized true-up balances because it does not reflect how utilities finance their assets. AEP opined that a cost-of-debt rate is inappropriate because long-term assets are not financed on an asset-by-asset basis and thus the risk measure of any given long-term asset cannot be isolated. AEP further argued that applying the cost of debt to true-up balances would distort the return measure for other long-term assets. TNMP noted that ratepayers would be paying interest to the utilities on money owed to the utilities at a lower rate than the rate at which the utilities would have financed the money and that transmission and distribution utilities (TDUs) have to finance unsecuritized balances occurring as a result of retail electric provider (REP) defaults with debt and equity. CNP commented that the amendment makes no provision for the equity component of the utilities' capital structures.

TIEC asserted in its comments that the cost of debt more accurately reflects the risk borne by the utility associated with the recovery of the unsecuritized true-up balance. It added that REP risk is irrelevant because ratepayers pay for REP defaults.

AEP replied that the competition transition charge (CTC) amounts are subject to the risks inherent in the utility enterprise and that it would be difficult to assign higher-cost financing to the assets whose greater risk offsets lower-risk assets. CNP replied to TIEC that assessing the risk of collecting the unsecuritized balance is not the correct analysis for determining carrying costs; rather, the proper question is what costs the utility will incur while waiting for collection of the unsecuritized balance. CNP argued that until the company receives the funds from ratepayers, it will have to go to the debt and equity markets to raise capital. Additionally, CNP asserted, there is material cash-flow uncertainty associated with CTC payments because such payments are tied to billing determinants, and lower energy consumption or REP defaults could lead to collections shortfalls for the TDU. CNP further contended that, to the extend such shortfalls exist and are not addressed until the CTC true-up mechanism is activated, the TDU would have to obtain capital in the meantime at the cost of its weighted-average cost of capital (WACC). TNMP replied to TIEC that the realities of utility financing clearly demonstrate that limiting the CTC carrying charge to only the cost of debt fails to accommodate the fact that utilities must raise capital from both debt and equity.

OPC replied to the companies' positions by noting that if the commission so desired, every utility asset could be isolated and a specific risk level and return could be assigned to each asset. The application of an overall weighted cost of capital to a utility's rate base does not imply that each utility asset is of equal risk. More important, there is good justification for assigning a separate risk measure to the CTC true-up balances. OPC noted that, by statute, the CTC is nonbypassable for all classes of ratepayers and the risk of non-recovery is therefore minimal, and there is no other utility cost-of-service item that has been specifically identified as nonbypassable in PURA. Additionally, commission precedent in Docket No. 30706 (CNP's CTC case) provides additional assurances that every penny of the CTC will be recovered from ratepayers through operation of the true-up mechanisms in the CTC tariffs. OPC further maintained in its reply comments that investor return requirements are determined by the risk level associated with the asset to be financed, and that, in OPC's assessment, CTC assets are fundamentally no riskier than the securitized assets.

Cities stated in reply comments that the utilities fail to acknowledge the fact that the method specified under the Public Utility Regulatory Act (PURA) and commission rules for recovery of final true-up balances is far different from the normal process for recovery of investments under traditional ratemaking. Under the latter, significant regulatory lag exists between the time that investments are made and the time that recovery of and on those investments occurs through base rates. Moreover, recovery of investments through base rates is not guaranteed. While utilities are provided the opportunity to earn a reasonable return on their investments under the traditional regulatory process, there is no true-up mechanism or other guarantee of recovery such as that which applies to the recovery of true-up balances. Additionally, the final true-up balances are recovered over a much shorter period (*e.g.*, 14 years) than investments under the traditional base ratemaking process (up to 40 years). Cities further opined that the recovery of true-up balances is much more similar to the recovery process for reconcilable fuel than to the ratemaking process for base rates that has applied under traditional regulation, and Cities noted that the commission has historically applied a short-term interest rate that typically has been lower than the utility cost of debt for calculating interest on fuel balances. Cities further averred that no evidence exists to support the claim by utilities that REP insolvency warrants a higher rate of return for the CTC balance, and that CTC charges to date have represented a relatively small percentage of nonbypassable charges. Cities pointed out that such charges are simply included in the cost of retail energy billed by the REP and collected from end-use customers. Cities also stated that the use of a debt-based rate simply reflects the diminished risk of recovery of true-up costs when compared to traditional regulated investments, which do not enjoy the guaranteed recovery or true-up provisions that are applied to the true-up balances.

TIEC stated in its replies that the true-up assets are unique and need not be supported with a traditional capital structure, and that the high degree of certainty associated with the collection of these assets clearly indicates that they should be financed with debt. TIEC pointed out that the revenues to amortize the unsecuritized true-up assets will be: (1) tracked separately from other revenues; (2) subject to increase or decrease if actual collections fall outside of a 15% band in any given year; and (3) subject to a final-year true-up to ensure no under-collection during the amortization period. Moreover, TIEC pointed out, the CTC charges are nonbypassable. TIEC argued that each of these characteristics is designed to eliminate risk, making the unsecuritized true-up amounts a highly unique asset that need not be treated like the typical utility asset. Because of these unique characteristics of the true-up assets, TIEC opined that the utilities' claim that it is inequitable to lower the carrying cost to a cost of debt is unsound. It must therefore be recognized, TIEC averred, that the commission's careful attention to developing a rate design in order to reduce risk must have *some* effect (TIEC's emphasis). Yet, TIEC observed, the utilities would ignore all of that and pretend that these assets must be financed in a traditional manner. TIEC also noted that the utilities' arguments that regulatory risk such as the disallowance of requested stranded-cost amounts justifies a high interest rate are far-fetched, because if this type of regulatory risk necessitates a high interest rate, then utilities could simply manufacture such regulatory risk by requesting amounts far in excess of anything that is reasonable. For example, if the commission were to reduce the amount of an award to a just and reasonable level, the utility could claim this treatment as an example of regulatory risk, when in fact the

commission was simply applying its discretion to establish just and reasonable rates.

Risk of Collection

TNMP and CNP commented that a TDU must serve all certified REPs under the standard tariff, and that there is no assurance of collection, and TDUs have limited ability to manage their risks of non-collection. TNMP further stated that the end-use consumer's obligation to pay the nonbypassable CTC amount to a REP provides no guarantee that TNMP will recover its charges. TNMP cited recent financial difficulties facing various REPs and argued that the failure of these entities points to an increase in the risks associated with recovering unsecuritized balances. AEP similarly opined that REPs today may be less creditworthy than they were at the various times the commission decided in the past to use the unbundled cost of service (UCOS) WACC for unsecuritized balances, and observed that in the last year alone, at least six REPs in the CNP service area have exited the retail market or are in the process of leaving the market because of financial troubles. CNP expressed its belief that it has more risk in recovering the CTC balance than ratepayers have in recovering the accumulated deferred income taxes (ADFIT) benefit.

TIEC argued that utilities have negligible collection risk associated with recovering the CTC balance because ratepayers will always be available to pay the amounts the utility is owed and, accordingly, there is no material cash-flow uncertainty associated with CTC payments that ratepayers make to the utility. TIEC reiterated that the commission has taken additional steps in its final order addressing CTC design in the one contested case (the CenterPoint case) that it has considered thus far--that is, CenterPoint's CTC final order provides that, in the event of over- or under-recovery equal to or greater than 15%, CenterPoint or the commission staff may initiate a proceeding to adjust the CTC rate to reduce or eliminate the over- or under-recovery; further, the commission authorized a true-up in the final year of the CTC collection to ensure that the utility collects the full amount that the commission has approved. TIEC noted that although collection risk has been virtually eliminated through these commission-approved mechanisms, a carrying cost based on the cost of debt nevertheless reflects whatever small risk may still attach to CTC recovery from ratepayers.

CNP stated in its replies that TIEC's belief that the WACC constitutes an unreasonable burden on ratepayers rings hollow because TIEC has argued in the past that the commission could not allow securitization of non-stranded-cost true-up balances, meaning that such amount had to be recovered in a CTC. CNP suggested that if TIEC truly believed that paying the WACC was an unreasonable burden, it and other intervenors would have agreed to securitize the entire true-up balance, regardless of their views on whether the commission had the power to impose securitization on them.

AEP reiterated in its replies its position that realization of the CTC amounts is subject to the risks inherent in the utility enterprise, and that the long-term cost of capital for those risks is the utility's weighted-average cost of capital. AEP expressed its belief that if the risks for some assets were lower than those of the enterprise in general, assigning lower-cost financing to those assets would require assigning high-cost financing to others if the overall cost of capital is to be properly reflected. AEP asserted that this would be a difficult and complicated way to set rates.

TIEC restated in its replies the point that true-up rates are nonbypassable, and that even if a REP goes bankrupt, ratepayers are the ones who are still on the hook. TIEC held that ratepayers are always there to pay the bill, even in the event of a REP default on nonbypassable payment, and so the utility will still collect its money from ratepayers. TIEC noted that CNP's Tariff for Delivery Service acknowledges this fact and expressly notes that there may be periodic adjustments to the CTC. TIEC rejected CNP's claim that TDUs have no assurance of collecting CTCs, because they are guaranteed--by virtue of a final year true-up--to collect every dollar they are awarded.

CNP and TNMP commented generally that the rule change is unnecessary because the commission has already decided the issue, and further pointed out that on at least six prior occasions, the commission decided to use the utility's WACC from the UCOS case. CNP argued that the risk of recovering the unsecuritized balances is no different today that it was for the six times the commission decided that the UCOS WACC was a fair rate of return. CNP also opined that utility investors rely on the commission to foster a fair and consistent regulatory policy, and that the commission has done so to date with regard to the rate for true-up balances. Cities replied to CNP's comments by noting that investor reports have opined that the greatest financial risk faced by CNP is the pending rate investigation, and Cities further noted that the impact of the true-up interest rule change would be approximately 5 cents per share. Cities additionally pointed out that CNP has already been allowed to recover more than $257 million in interest on true-up balances through August 2004. TIEC replied to CNP that the Wall Street community expects the commission to act rationally and reasonably, and that there is no expectation that an unjustified rate would continue in perpetuity. TIEC stated that it is unlikely that the decremental revenue associated with a reduction to the interest rate applicable to unsecuritized balances would be material to large companies, and TIEC further noted that the daily closing prices of CNP and AEP reveal that their stock prices have suffered no harm as a result of this rulemaking. TIEC pointed out that, in fact, in the days following the commission's entry of a final order reducing AEP Central's total true-up request by almost a billion dollars, AEP's stock price actually increased, and it is therefore unrealistic to assume that any amendment to the carrying cost on the unsecuritized balances would have a material impact on these utilities' stock prices.

Intention of Original Rule

TIEC commented, and OPC agreed, that the drafters of the original rule did not contemplate that the rate that was prescribed therein would be used for an extended period of time. AEP commented that there is no harm in the rate being used for an extended period of time because the original rate is based on sound financial theory.

CNP replied to TIEC and OPC that the commission has previously rejected the contention that the UCOS rate was intended to apply for only a short period of time, and that the commission stated in its order in Docket No. 30706 that no conclusion could be drawn that the interest rate stated in the rule was linked to a form and timing of recovery that was not required by the rule and that was within the utility's discretion to choose. CNP additionally responded that because the commission has found that the time period and the rate are unrelated, the staff testimony cited by TIEC cannot support an amendment of the rule.

While AEP commented that the rule is the product of a reasoned, deliberative process to which affected parties had input, TIEC replied that such claims are disingenuous because the existing rule resulted from a contemplated circumstance--a single

overall true-up balance that would be securitized--that has now changed.

Taxes

OPC recommended that the rule have a provision for the rate to include the effect of income taxes. CNP noted that the proposed rule does not have an adjustment to gross-up any portion of the rate assumed to be related to equity, and that as a result, the current proposal is even more punitive to utilities than anything the staff and intervenors have offered in earlier proceedings.

Commission response

The commission agrees with the ratepayer groups--TIEC, OPC, and Cities--that the risk of not recovering the CTC is less than the average risk of all the utility's cash flows. This lower risk is primarily the result of the statutorily approved true-up process and the resulting ratepayer responsibility for the entirety of the CTC payment. The commission also agrees with the utilities--AEP, CNP, and TNMP--that a utility's assets are financed with a combination of debt and equity, the costs of which reflect the risk of the utility's entire enterprise, including assets with various risk levels, the risk associated with the collection of payments from REPs of varying financial condition, and the uncertainty about the future strength of the economy of the TDU's service area. Such factors reflect the combined risk of the enterprise and the fact that all of a utility's cash flows are dedicated to fulfilling all its financial obligations. These two basic positions advocated by the ratepayer groups and the companies are compatible and must both be addressed in answering the question of what interest rate is appropriate for the carrying cost of a utility's unsecuritized true-up balance.

With respect to the lower recovery risk of true-up balances, the commission has previously recognized this aspect of the collection of stranded costs in Docket No. 22344, *Generic Issues Associated with Applications for Approval of Unbundled Cost of Service Rate Pursuant to PURA Section 39.201 and Public Utility Commission Subst. R. 25.344*. In that docket, which was conducted in conjunction with the UCOS cases, the commission stated in its Order No. 14 that:

The Commission also concludes that it is appropriate to recognize the reduction in risk resulting from both the guarantee of stranded cost recovery by the Legislature and the shortened recovery term compared with traditional regulation. The Commission has previously recognized that there are reductions in risk due to shortened recovery periods that should be reflected in a lowered rate of return for the utility.

The commission reached the same conclusion on page 18 of its order in Docket No. 22352, *Application of Central Power and Light Company for Approval of Unbundled Cost of Service Rate Pursuant to PURA §39.201 and Public Utility Commission Substantive Rule §25.344.*

Consistent with these concepts, the commission concludes that a three-step process is appropriate for the determination of the cost of capital of a utility with an unsecuritized true-up balance. All three steps require weighting: two on the basis of different types of capital in the capital structure, and the third on the basis of different types of a utility's recoverable assets.

The first step is to estimate the utility's cost of capital as if it did not have an unsecuritized true-up balance (this assumption is reasonable because a utility's authorized return on equity is typically based in large measure on an analysis of comparable companies that do not have CTC balances). This step requires that the different types of financial instruments in the utility's capital structure be appropriately weighted to calculate the rate of return. This step is typically and best accomplished as part of a rate case, although using the utility's currently allowed rate of return is acceptable.

The second step is to use the same formulaic approach described above for the first step to determine the cost of capital for the unsecuritized true-up balance. This second step applies a rate of return that is partly an actual debt rate and partly a marginal debt rate that is grossed up to reflect the impact of federal income taxes on the recovery of unsecuritized true-up amounts. Application of this approach in this instance recognizes that the risk of recovery of the unsecuritized true-up balance is less than the risk of recovery of the utility's transmission and distribution assets. It further recognizes that all the utility's assets, including the true-up balances, are financed with both debt and equity (albeit a lower-cost equity for the true-up balances). Finally, it recognizes that all of the utility's capital structure supports all the utility's assets and reflects the risks of not recovering sufficient revenue to cover the utility's costs. The weighting in this step is applied to the utility's marginal cost of debt (MC) and the historical cost of debt (HC), and it is to be done according to the formula set forth in greater detail below.

The third step is the final weighting. In this last step, the two costs of capital derived in the first two steps are blended. Each receives a weighting equal to its proportion of the utility's recoverable asset base. This step is the same approach that the commission employed in PUC Docket No. 14965, in which the cost of capital of Central Power and Light (CPL)--the predecessor of AEP Texas Central--was weighted to reflect two different assets with different risks. (See PUC Docket No. 14965, Second Order on Rehearing, Finding of Fact 113A.) One portion of CPL's recoverable asset amount--ECOM, the Excess Cost over Market value of CPL's generation assets--was determined to be less risky than the remaining non-ECOM portion of the utility's asset base. The commission found that both parts of CPL's rate base--the ECOM portion of approximately $800 million and the non-ECOM portion of approximately $2.1 billion--were financed with the same capital structure and the same debt, but the commission concluded that the equity costs of the two parts were different. In that docket, the commission assigned the less risky ECOM portion a cost of equity equal to the utility's historical cost of debt. Additionally, to reflect the equity portion and the associated tax expense of the capital structure associated with the ECOM rate base, the commission grossed-up that portion of the debt rate assumed to be equity.

The resulting cost of capital for CPL's ECOM balance, when blended on a weighted-average basis with the traditional WACC rate for the non-ECOM rate base, represented a composite risk assessment of the entirety of the utility's recoverable assets, and this composite rate was then applied to not only the lower-risk ECOM asset, but to the utility's non-ECOM rate base as well. In this way, the different risks associated with the ECOM assets and the non-ECOM assets were both reflected in the composite rate of return on a proportionate basis, and thus in the commission's determination of CPL's total revenue requirement.

In this rulemaking, the commission adopts the same conceptual approach and has amended the rule to provide for the application of the overall composite rate to both the CTC assets *and* the T&D assets. As previously noted, this approach takes into account the ratepayer groups' basic position that recovery of the CTC asset entails reduced risk as well as the utility companies' basic

position that assets are financed with a combination of debt and equity, the blended costs of which reflect the risk of the utility's entire enterprise.

The commission therefore concludes that the correct rate at which a utility should accrue carrying costs on a stand-alone CTC or unsecuritized true-up balance is the weighted average of an adjusted form of its marginal cost of debt and its unadjusted historical cost of debt, with the weighting based on the utility's most recently authorized capital structure. The MC component is adjusted because it is used as a proxy for the cost of equity and must therefore be grossed-up to account for the effects of federal income taxes. MC will be based upon the average yield for long-term public utility bonds of the utility's credit rating published in *Moody's Credit Perspectives* or a similar publication during the most recent three months prior to the filing of the utility's application to update its carrying-charge rate. These calculations are summarized in the following formula:

CTC Carrying Charge Rate = MC * Equity Proportion of Most Recently Authorized Capital Structure * 1/(1-Tax Rate) + HC * Debt Proportion of Most Recently Authorized Capital Structure

The CTC Carrying Charge Rate as determined above will then be blended with the utility's authorized TDU WACC to develop a composite rate of return that shall be applied to the entirety of the utility's recoverable regulated assets. The composite rate shall be determined as follows:

Composite Pre-Tax Rate of Return = CTC Carrying Charge Rate * Unsecuritized True-up Balance / (Unsecuritized True-up Balance + TDU Rate Base) + TDU Authorized Pre-Tax WACC * TDU Rate Base / (Unsecuritized True-up Balance + TDU Rate Base)

This approach achieves a reasonable result because it: (1) uses data that are readily ascertainable; (2) reflects all the actual carrying costs that can be calculated or estimated with reasonable certainty; and (3) accommodates the conceptual arguments of both the ratepayer groups in part and the utilities in part. It is also consistent with commission precedent, paralleling the commission's decisions in Docket No. 14965. The rule as adopted incorporates this methodology to allow the commission to take into account in a utility's rate case the effects of the corresponding adjustment to the company's authorized rate of return that is applied to its TDU rate base.

Further, to account for situations in which a utility does not have a pending or near-future rate case in which the rule and the resulting composite rate can be applied to the entirety of the utility's recoverable assets (both the unsecuritized true-up balances as well as the TDU rate base), the commission provides for the CTC Carrying Charge Rate described above to be applied to a company's CTC balance on a stand-alone basis until its next rate proceeding. That is, until a utility has a rate proceeding in which the rate-of-return adjustments described above can be applied to all of the utility's assets that have been authorized for recovery, the rule specifies that the utility's unsecuritized true-up or CTC balance will earn interest at the lower CTC Carrying Charge Rate and the utility's T&D rate base will earn a return at the authorized cost of capital unadjusted for the lower-risk CTC balance. This approach is appropriate because the amount of revenues produced will be the same regardless of whether: (1) the composite rate of return, which is based on a weighted average of the CTC carrying charge rate and the unadjusted traditional WACC, is applied to the entirety of the utility's assets including both the unsecuritized true-up balance and the TDU rate base; or (2) the CTC Carrying Charge Rate is applied to the unsecuritized true-up balance separately while the TDU rate base earns a return based on the unadjusted traditional WACC. Paragraph (l) of the adopted rule sets forth these provisions.

The commission notes that, in a situation in which a utility has a negative CTC balance, the use of the composite blending approach results in the utility's composite rate of return being *higher* than the unadjusted T&D rate of return. This seemingly counter-intuitive result is simply a mathematical consequence of the negative nature of the CTC balance and does not change the fact that, as previously described, the amount of revenues produced is the same under either of the two methods.

Legality of Changing the Interest Rate

TNMP argued that the proposed amendment violates Texas Law by altering the interest rate for recovery of unsecuritized balances previously approved by the commission. TNMP stated that revising the rate to be applied to its true-up balance would reopen the issues settled in the commission's final order in its true-up Docket No. 29206, and that while the commission is not prevented from amending its rules, such amendments can only apply to future orders. TNMP further asserted that the carrying charge rate permitted by the current version of Subst. R. §25.263(l)(3) is no different from the interest rate imposed on unpaid judgment balances. TNMP reiterated in its replies that in Docket No. 29206, the commission calculated the rate to be applied to the unsecuritized amounts to be recovered by TNMP, and that upon appeal to the district court, the commission lost jurisdiction to alter or reconsider the issues determined in that docket.

CNP contended that changing the rate would nullify the commission's rate decision on CenterPoint's competition transition charge proceeding, which is final and on appeal; CNP further asserted that well-settled Texas law prohibits an agency from reconsidering a final order. CNP argued that when a one-time order (such as in its CTC case) has been issued allowing recovery of a specific amount at a specific rate, that order cannot be superseded or nullified by a subsequent rulemaking. CNP opined that a CTC order is distinguishable from a typical utility rate order, which can be superseded at any time by a new rate order. CNP likened the CTC order to a final judgment in a civil case in which a static amount is recovered based upon events that happened solely in the past. CNP also argued that the proposed rule would reduce the rate on unsecuritized balances to nearly the rate paid on securitized amounts, thus effectively allowing ratepayers the benefits of securitization but denying the utilities of its corresponding benefits. CNP averred that such results would be contrary to legislative intent underlying the securitization statutes. CNP went on to state that the commission has said that a utility, not the commission or ratepayers, has the right to choose whether to securitize, but the amended rule would effectively force utilities to accept a securitized rate at a time of the commission's choosing, and that while the such true-up items as the capacity auction cannot be securitized, the amended rule would assign what is essentially a securitization rate to the utilities' capacity auction true-up balances.

TIEC commented that the rule does not violate prohibitions against retroactive laws because those prohibitions only apply if a vested right is impaired. TIEC opined that the commission's previous determinations of the interest rate on true-up balances was based on the rule that it is now considering changing and that the commission has authority to change its own rules. TIEC further stated that an entity that has obtained a prior final order based on a prior rule is expected to comply with the new rule if

the commission changes the prior rule; the entity is not given a lifetime exclusion from the application of a new rule simply because it had a final order that referenced, or was guided by, a prior rule.

OPC stated in its replies that the unsecuritized true-up balances are now considered to be regulatory assets, and that the returns thereon are subject to change, either in rate cases or through other proceedings. OPC further replied that the true-up orders for CNP, TNMP, and AEP do not state that the unsecuritized carrying charges cannot be changed on a prospective basis in a future proceeding. OPC argued that the utilities' comparison of the CTC interest rate with the interest rate specified in a court judgment is false. Unlike the jurisdiction of a court in regard to a money judgment and interest thereon, the commission has continuing regulatory jurisdiction over the utility's collection of the CTC after the commission issues its order in a CTC case. OPC expressed its belief that the commission's application of Subst. R. §25.263(l)(3) does not preclude the commission from amending the rule for application on a prospective basis in view of current circumstances. To argue otherwise, OPC contended, would be to say that the commission has no regulatory authority over collection of the CTC once the commission issues its final order in a CTC case.

TIEC reiterated in its replies that utilities do not have a vested right in WACC-based carrying costs because the CTC rate is based on the commission's rule, which is itself within the discretion of the commission to revise. TIEC stated that although the utilities have a vested right to interest on stranded costs, they do not have a vested right in the specific method of determining the rate described in the original version of Subst. R. 25.263(l)(3). The utilities' right to interest is separate and apart from the actual interest rate.

Commission response

The commission concludes that it has authority to change the interest rate on the CTC balance. In reference to their final true-up and CTC orders, several utility commenters argued that the commission cannot amend or reconsider an order that is final. This proceeding, however, is a rulemaking and does not constitute a reconsideration or amendment of any prior contested case orders of the commission. Moreover, the CTC is a "rate," as that term is used in PURA. PURA authorizes the commission to change rates on a prospective basis.

Utility commenters argued that they have a vested property interest in the continuation of the use of the UCOS WACC. The commission disagrees that the rule creates a vested property interest. Under Texas law, a right cannot be considered a vested property right unless it is something more than a mere expectation based upon an anticipated continuance of present laws. PURA provides specifically for making changes to the CTC. Therefore, no person may have a reasonable expectation in the continuance of any specific CTC amount. Moreover, PURA specifically provides that transition charges, in contrast to CTCs, do become vested property rights in the hands of the utility's assignees. If the legislature had intended to create property interests in CTCs, it would have done so.

Retroactive Ratemaking

AEP argued that it is improper to retroactively change the carrying cost for certain unsecuritized amounts back to January 1, 2002, and that while the commission has the authority, under appropriate circumstances, to make a prospective change to the carrying cost rate in the rule, it may not make such a change effective retroactively. Consequently, AEP opined, any change in the carrying cost rate may only be effective prospectively from the date the rule amendment is effective. TNMP commented that any changes to the rule should expressly provide that the new interest rate does not apply to interested accrued between January 1, 2002, and the effective date of the new amendment.

Cities responded that there are no commission final orders that establish the interest rate on the unsecuritized portion of the final true-up balances for those utilities beyond the final order dates in their respective true-up proceeding. Cities also maintained that there would be no retroactive ratemaking concerns because the commission has recognized that true-up adjustments may be necessary to ensure no over- or under-recovery of the CTCs, and that because the proposed rule reflects a change in the period over which the interest rate on the unsecuritized true-up balance would apply, the rule is no more of an improper retroactive adjustment than is the utilities' proposal to allow ongoing future adjustment to their proposed WACC-based carrying charge rates.

AEP stated in its replies that subsection (l)(3)(B) of the proposed rule, which modifies the carrying cost rate used to accrue interest since January 1, 2002, applies to TDUs for which the commission has not entered a true-up proceeding final order. AEP stated that all utilities now have a true-up final order and therefore subsection (l)(3)(B) no longer applies to anyone and should be removed. AEP further contended that even if some parties were to interpret the phrase "true-up proceeding final order" to mean a final and *appealable* order under the Administrative Procedures Act, that status has now been reached for all companies, including AEP Texas Central in Docket No. 31056. Cities expressed in reply comments the position that for utilities that have final and appealable true-up case orders as of the effective date of this rule, the appropriate effective date of carrying charge rates should be from the date covered by the commission's final order, not from 30 days after the effective date of the rule.

Commission response

Subsection (l)(3)(B) of the proposed rule was intended to address situations in which a utility did not yet have a commission final order. The final orders for all the true-up cases for utilities that have introduced customer choice in their service area are now final and appealable; hence, subsection (l)(3)(b) is no longer applicable to the TDUs that were created from the reorganization of these utilities. Consequently, the commission has deleted proposed subsection (l)(3)(b) from the final rule. Subsequent to the effective date of the rule, changes to the interest rates on utilities' unsecuritized balances will be applied on a prospective basis.

Consistency

AEP stated that using the cost of debt for unsecuritized true-up balances is inconsistent with pertinent statutory provisions, judicial decisions, and commission determinations in every true-up case. AEP also argued--and reiterated in its reply comments--that any rule change should treat similarly situated utilities consistently, and that the WACC rate should apply to the balance of securitizable stranded costs and regulatory assets until such balances are securitized, even if a change is made to the unsecuritizable true-up balances. AEP expressed its belief--and CNP concurred--that the provisions of PURA, which state that the purpose of securitization is to "lower the carrying costs of the assets relative to the costs that would be incurred using *conventional financing methods*" (AEP's emphasis), confirms the Legislature's

understanding that the concept of conventional utility financing means that, absent securitization, utilities would finance their assets through a balanced capital structure consisting of debt and equity.

TIEC asserted that AEP should not be allowed to accrue interest on unsecuritized balances at its WACC rate because it could have filed its true up case earlier as did the other utilities. TIEC stated that Texas ratepayers suffered great harm because of AEP's delay in filing AEP Central's true-up proceeding while accruing interest on the true-up balance at the WACC rate.

TIEC also replied that there should be no connection between what is an appropriate interest rate and the determination of whether securitization makes sense. TIEC argued that the appropriate interest rate should be determined based on the characteristics of the asset to be financed, and that the utilities can point to no legislative history indicating that the legislature intended for assets to be carried at an artificially high interest rate in order to justify securitization.

Commission response

The commission concludes that a significant statutory element of the transition to competition was the opportunity for stranded-cost securitization, which allows for the use of advantageous financing terms in the recovery of stranded-cost balances. The statute's reference to "conventional financing methods" suggests that a conventional rate is appropriate as the benchmark comparison to securitization financing methods. As the commission has noted above, however, a utility's composite financing cost is based on the entirety of its recoverable assets and the relative risks of those assets, including the financing costs of assets having lower risk as well as those having higher risk. This is true even if a utility does not have a lower-risk CTC asset.

The commission's earlier determination of the composite cost of capital for the entirety of a CTC balance and TDU rate base is an application of the same financial concept. It is a reflection of the fundamental financial principle that when the composition of a company's asset base changes, the overall risk borne by investors of recovering all their investments in all the utility's assets correspondingly changes. Accordingly, even if a portion of a utility's asset base--such as the unsecuritized true-up balance--accrues interest at a lower rate, when the securitization rate is compared to the overall composite cost of *all* financing, as described above in the discussion concerning the blended costs of lower- and higher-risk assets, the assumed financing advantages of securitization as contemplated by the statute remain clearly evident.

Additionally, it is not a reasonable outcome of PURA that significant amounts of true-up balances earn a traditional pre-tax WACC return for up to 15 years (or perhaps even longer), as would be true if a utility chose to not securitize its stranded costs under the rule prior to this amendment. The amounts under consideration are substantial: even if all eligible stranded costs are securitized, other unsecuritizable true-up balances in excess of $1 billion have been authorized by the commission. Given that PURA expressly provides for nonbypassable recovery of these amounts, for interest to accrue on nonbypassable balances of such magnitude at the traditional pre-tax WACC rate for up to 15 years or more is unreasonable. The commission therefore retains in the rule the application of the modified interest rate to *all* unsecuritized true-up balances.

Effect of Interest Rate Change on ADFIT Benefit

CNP contended that the calculation of the ADFIT benefits at its UCOS WACC rate of 11.075% indicates that the unsecuritized true-up balances should not be carried at the cost of debt. CNP argued that it would be arbitrary and capricious to recalculate carrying charges on a utility's CTC balance without also recalculating the utility ADFIT benefit using the same rate. In any case, CNP argued, there is zero cash-flow uncertainty associated with the ADFIT payments owed by CNP to ratepayer because ratepayers' CTC obligations were greater than CNP's ADFIT obligation, and therefore ratepayers could offset any ADFIT payment deficit against their own obligations to CNP. CNP added that the rule would benefit ratepayers by using a rate that is close to what they would enjoy with securitization, but the utility doesn't get the benefit of up-front bond proceeds.

Cities responded that the present value of the ADFIT benefit was determined based on the facts that existed in specific cases, and that based on those facts, final stranded cost claims were calculated. The proposed rule simply takes these final stranded-cost amounts and addresses the issue of the appropriate carrying charge to apply thereto, and it is not necessary or appropriate to again review the amount of the final approved true-up balances. Cities averred that the utilities' proposal to do just that by adjusting the approved ADFIT benefit is improper and should not be allowed unless the commission is willing to review and adjust the recoverable true-up balances for other changed circumstances impacting the magnitude of the true-up balances and their ultimate recovery. OPC similarly stated that the proposed rule amendment has no effect on the ADFIT benefit calculation.

TIEC responded that there is no connection at all between the interest rate on unsecuritized balances and ADFIT, and that the utilities enjoyed hundreds of millions of dollars of non-cash earnings stemming from applying an interest rate based on the weighted average cost of capital retroactively to January 1, 2002. TIEC replied that CNP's arguments concerning the ADFIT benefit are unpersuasive for three reasons: First, they are separate calculations--the calculation of the ADFIT benefit recognizes that the ADFIT balance is available to the utilities to be used for corporate purposes, thus displacing the need for the utility to raise capital in the capital markets at the WACC rate; recovery of the unsecuritized true-up assets, on the other hand, results in a stream of revenue that, because of sufficient certainty, can be financed solely with corporate debt. Second, the ADFIT benefit was calculated using an interest rate taken at a moment in time, and it would be inappropriate to revisit that calculation without revisiting the carrying costs of every other asset approved for recovery in the true-up proceedings, including the interest rate on stranded costs going back to January 1, 2002. Third, the carrying cost applicable to the true-up balances is governed by a commission rule that is subject to change in the future, whereas the ADFIT benefit calculation is not the subject of a rule, but rather is the subject of an order that has now become final. TIEC and Cities stated in their replies that the utilities have earned WACC interest on stranded costs of literally hundreds of millions of dollars for over four years, and by contrast, using a WACC discount rate to calculate the ADFIT benefit results in an incremental ADFIT benefit that is paltry in comparison to the benefits enjoyed by the utilities by virtue of the application of the WACC interest rate from a date of January 1, 2002.

Commission response

The commission agrees with the ratepayer groups' position that no change should be made to the present-value amount of the

ADFIT benefit. Like the quantification of the market value of the generation assets to which the ADFIT balances are related, the present-value quantification of the ADFIT benefits was based upon variables and assumptions that existed at a specific point in time. The market values of the generation assets were based upon expectations regarding a variety of factors including commodity prices, economic conditions, and--like the present-value quantification of the ADFIT benefits--future interest rates. Although all these factors are subject to constant change, the commission authorized a recoverable amount of stranded costs--as well as the related offsetting present-value amount of the ADFIT benefit--based on the particular conditions that existed at the time of market valuation. Once these amounts--both the stranded-cost balance for a utility and the related present-value ADFIT benefit--were determined, they become part of the commission's final order and are now no longer subject to re-quantification.

Moreover, unlike unsecuritized true-up balances, an ADFIT benefit is not part of the asset base in which investors invest. This is affirmed by the fact that, in a traditional rate proceeding, the ADFIT benefit is the result of the utility using the ADFIT balance, which is temporary cost-free capital provided by the government, to reduce the utility's return-earning rate base, and the company's use of the ADFIT balance in this manner neither detracts from nor adds to the rate of return achieved by traditional investors. Rather, in a traditional rate case, the purpose of reducing the return-earning rate base by the ADFIT balance is simply to flow through to customers the benefits of the cost-free capital--and this was exactly the same objective achieved in the true-up cases, with the valuation of the benefits consistent with the terms and timing existing at the point of stranded-cost determination. Accordingly, the commission makes no changes to the rule to re-quantify the amount of ADFIT benefits.

Updating the Rule

AEP, CNP, and TNMP commented that, if the rule is going to be amended at all, the commission should only change the rule so that it authorizes recovery of the unsecuritized true-up balance using a utility's most recent pre-tax WACC as authorized in a rate case. AEP acknowledged that a company's WACC can change over time (as evidenced by the change from the 11.795% WACC rate authorized in its UCOS case to the 9.56% rate in its last rate proceeding, Docket No. 28840), but AEP further stated that if the commissioners believe a current rate should be used, the amended rule should allow for subsequent updates as capital costs change in the future. TIEC agreed, stating that the proposed rule should provide a flexible interest rate that is designed to reflect currently existing market conditions.

AEP reiterated in its reply comments that it does not oppose a flexible rate that can reflect more current market conditions through adjusting the pre-tax weighed average cost of capital to that approved in a base-rate proceeding. CNP noted in its reply comments that it is not necessary to adopt a debt rate to achieve flexibility, and that TIEC implicitly acknowledged this fact in CNP's CTC docket when TIEC recommended that the rate for calculating carrying charges on the CTC balance should be changed whenever TDU rates change.

TIEC observed that although each of the utilities claims that the true-up rule cannot be changed without impermissibly modifying a commission final order, they nevertheless propose an alternative recommendation to use an updated weighted average cost of capital. TIEC contended that the utilities have therefore implicitly acknowledged the propriety of this rulemaking and the unreasonableness of their claims that the commission is somehow prohibited form changing the carrying cost.

Commission response

The commission agrees that updating a utility's CTC interest rate in the utility's future rate cases is appropriate. Such a provision was included in the proposed rule and is retained in the adopted rule.

Changes to rate on retail clawback and fuel balance

AEP and TNMP advised that the commission should adjust the carrying charges on the retail clawback amounts if it changes the carrying cost for the unsecuritized balances. Cities agreed in its replies. OPC replied that changing the interest rate on the CTC balance to more accurately reflect the risk associated with collecting the CTC does not have any impact upon the calculation of interest on the unpaid balance of the retail clawback or a fuel expense over-recovery. OPC opined that the availability to the utility of the funds related to the retail clawback and fuel over-recovery provide the utility with a cost-free source of capital until the balances are paid to ratepayers, and that the benefit to the utility of the use of such funds should not be confused with the risk of collecting the nonbypassable CTC from ratepayers.

AEP pointed out in its reply comments that retaining the use of the pre-tax weighted-average cost of capital could also provide, in some cases, a benefit to ratepayers. This would result from a situation--such as that of AEP Texas Central--in which the CTC consisted of a negative balance to be credited to ratepayers. If the pre-tax WACC were applied to the negative balance instead of a debt-based rate, ratepayers would receive greater benefits.

Commission response

The commission agrees with AEP, TNMP, and Cities that a utility's retail clawback balance and final fuel balance should be subject to the same interest rate adjustment as the rest of the CTC balance. Upon the issuance of a utility's true-up final order, all these true-up items become part of a regulatory asset or regulatory liability and should be accorded the same treatment. The rule has been modified accordingly.

Verifying the Calculation

OPC suggested that the rule should provide for supporting workpapers and a possible review of the debt calculation. CNP replied that it is unnecessary and inappropriate for the cost of debt calculation to be reviewed because it is straightforward and because commission Staff has the resources to confirm that it is done correctly. CNP further replied that if staff needs clarification from the utility on a calculation, it will presumably request whatever information it needs, and that the time and effort spent by staff in refereeing discovery disputes would likely far outweigh any incremental benefits that might accrue as a result of the discovery that OPC seeks.

Commission response

The commission agrees with CNP that it is not necessary for the rule to specifically provide for the inclusion of supporting workpapers and a possible review of the interest-rate calculation. To the extent that commission staff or other parties need additional data, they can request such information. Accordingly, no change to the rule has been made.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this sec-

tion, the commission makes other minor modifications for the purpose of clarifying its intent.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998 & Supplement 2005) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.252, which addresses a utility's right to recover stranded costs, and PURA §39.262, which requires the commission to conduct a true-up proceeding for each investor-owned electric utility after the introduction of customer choice and which prohibits over-recovery of stranded costs.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.252 and 39.262.

§25.263. True-up Proceeding.

(a) Purpose.

(1) The purpose of the true-up proceeding is to quantify and reconcile the amount of stranded costs, the differences in the price of power obtained through the capacity auctions and the power costs used in the excess costs over market (ECOM) model; the results of the annual reports; the level of excess revenues, net of nonbypassable delivery charges, from customers who continue to pay the price to beat (PTB); the reasonable regulatory assets not previously approved in a rate order that are being recovered through competition transition charges (CTCs) or transition charges (TCs); and the final fuel balances. The purpose of the true-up proceeding is also to provide for the recovery of regulatory assets not already approved for securitization that were to be considered in future proceedings pursuant to a commission financing order in a securitization case.

(2) An electric utility, together with its affiliated retail electric provider (AREP), its affiliated power generation company (APGC), and its affiliated transmission and distribution utility (TDU), shall not be permitted to over-recover stranded costs through the application of the measures provided in the Public Utility Regulatory Act (PURA), Chapter 39, or under the procedures established in PURA §39.262 and this section.

(b) Application. This section applies to all investor-owned transmission and distribution utilities established pursuant to PURA §39.051, their APGCs, and their AREPs. In addition, the reporting requirements of subsection (j)(6) of this section apply to all retail electric providers (REPs) serving residential and small commercial customers.

(c) Definitions. The following words and terms, when used in this section, shall have the following meanings unless the context indicates otherwise:

(1) Capacity auction total price of power ($/MWh)--The total (fuel plus non-fuel) capacity auction revenues for entitlements to capacity for the years 2002 and 2003 divided by the total capacity auction energy (expressed in MWh) scheduled to be delivered for those entitlements over the same time period.

(2) Independent third party--The party designated by the commission to perform the duties described in subsection (j) of this section.

(3) Mitigation--The total excess earnings and redirected depreciation applied to generation assets pursuant to PURA §39.254 and §39.256 or a commission order issued after 1996 that approved a utility's transition case.

(4) Net mitigation--Any mitigation that has not been reversed or refunded as of the date of the final order in the true-up proceeding.

(5) Net value realized--All compensation paid by a buyer for generation assets, including the buyer's assumption of debt, less any costs of sale such as legal fees, broker fees, and other reasonable transaction costs.

(6) Projected stranded costs--The value produced by the ECOM model and approved by the commission in the proceeding conducted pursuant to PURA §39.201.

(7) Regulatory assets--The generation-related portion of the Texas jurisdictional portion of the amount reported by the electric utility in its 1998 annual report on Securities and Exchange Commission Form 10-K as regulatory assets and liabilities, offset by the applicable portion of generation-related investment tax credits permitted under the Internal Revenue Code of 1986.

(8) Residential market price of electricity--The volume-weighted average price, less average nonbypassable charges (each expressed in cents per kilowatt-hour (kWh)), calculated by the independent third party for residential electric service provided by non-affiliated retail electric providers and non-provider of last resort (POLR) service providers competing in the TDU region. The price determined by the independent third party shall be based upon pricing disclosures pursuant to §25.475(e) of this title (relating to Information Disclosures to Residential and Small Commercial Customers) and other information provided to the independent third party.

(9) Residential net price to beat--The average residential PTB rate (expressed in cents per kWh) less the average nonbypassable charges (expressed in cents per kWh) applicable to residential customers.

(10) Small commercial market price of electricity--The volume-weighted average price, less average nonbypassable charges (each expressed in cents per kWh), calculated by the independent third party for small commercial electric service provided by non-AREPs and non-POLR service providers competing in the TDU region. The price determined by the independent third party shall be based upon pricing disclosures pursuant to §25.475(e) of this title and other information provided to the independent third party.

(11) Small commercial net price to beat--The average small commercial PTB rate (expressed in cents per kWh) less the average nonbypassable charges (expressed in cents per kWh) applicable to small commercial customers.

(12) Transferee corporation--A separate affiliated or non-affiliated company to whom an electric utility or its APGC transfers generation assets.

(13) Transmission and distribution utility (TDU)--A transmission and distribution utility that, pursuant to PURA §39.051, is the successor in interest of an electric utility certificated to serve an area.

(14) Transmission and distribution utility region (TDU region)--The affiliated transmission and distribution utility's service territory.

(d) Obligation to file a true-up proceeding.

(1) Each TDU, its APGC, and its AREP shall jointly file a true-up application pursuant to subsection (e) of this section.

(2) Each TDU that is a successor in interest of any utility that was reported by the commission to have positive ECOM, denoted as the "base case" for the amount of stranded costs before full retail competition in 2002 with respect to its Texas jurisdiction in the April 1998 Report to the Texas Senate Interim Committee on Electric Utility Restructuring entitled "Potentially Strandable Investment (ECOM) Report: 1998 Update," and such TDU's, APGC's, and AREP's, shall

file the true-up application as required by subsections (f) - (k) of this section.

(3) All TDUs not described in paragraph (2) of this subsection, their APGCs, and their AREPs shall file the applications required by subsections (h) and (j) of this section.

(e) True-up filing procedures.

(1) Each TDU, APGC, and AREP shall file all testimony and schedules on which they intend to rely for their direct case in accordance with the true-up filing package prescribed by the commission.

(A) Within 20 calendar days of the filing of a true-up application, commission staff or any intervenor may file a motion stating that the filing is materially deficient. Any such motion shall include a detailed explanation of the claimed material deficiencies.

(B) If the presiding officer determines that an application is materially deficient, the TDU, APGC, and AREP shall correct the deficiencies within 30 calendar days. The deadline for final commission order shall be extended day for day from the date of initial filing until the corrections are filed with the commission.

(2) At least 90 days prior to the filing of the first true-up application scheduled by the commission, a utility's APGC shall file a notification of intent with the commission if it intends to utilize PURA §39.262(i) to determine the amount of its stranded costs for nuclear assets.

(3) The commission may initiate a generic proceeding to determine true-up issues that are common to multiple TDUs, APGCs, and AREPs. This proceeding may include updates to the ECOM model required by subsection (f)(2)(B) of this section, in the event a notification of intent is filed pursuant to paragraph (2) of this subsection. The commission may order further updates to any order approved in a generic proceeding pursuant to this section for any utility whose customers are not offered competition on January 1, 2002.

(4) As part of the true-up proceeding, the commission shall make a determination with respect to whether the TDU, the APGC, and the AREP have complied with PURA §39.252(d). If the commission finds that the TDU, the APGC, or the AREP have failed, individually or in combination, to fully comply with their obligations under PURA §39.252(d), the commission may reduce the net book value of the APGC's generation assets or take other measures it deems appropriate in the true-up proceeding filed under this section. In making a determination as to compliance with PURA §39.252(d), the commission shall not substitute its judgment for a market valuation of generation assets determined under PURA §39.262(h) or (i).

(5) The State Office of Administrative Hearings shall employ expedited procedures during discovery in the true-up proceedings.

(6) The commission shall issue the final order for each proceeding filed under this section not later than the 150th day after the filing of a complete, non-deficient application. Notwithstanding the foregoing, however, the 150-day deadline may be extended by the commission for good cause.

(f) Quantification of market value of generation assets.

(1) Market value of generation assets shall be quantified using one or more of the following methods:

(A) Sale of assets method. If an electric utility or its APGC sells some or all of its generation assets after December 31, 1999, in a bona fide third-party transaction under a competitive offering, the total net value realized from the sale shall establish the market value of the generation assets sold. Within 30 days of closing, the utility or its APGC shall provide to the commission a detailed explanation, which may be filed confidentially, of the transaction and a description of the generating unit, property boundaries, fuel and parts, emission allowances, and other general categories of items associated with the sale, including any ancillary items related to the assets.

(B) Stock valuation method. The following method of market valuation without using a control premium may be used to value generation assets.

(i) If, at any time after December 31, 1999, an electric utility or its APGC has transferred some or all of its generation assets, including, at the election of the electric utility or the APGC, any fuel and fuel transportation contracts related to those assets, to one or more separate affiliated or nonaffiliated corporations, not less than 51% of the common stock of each corporation is spun off and sold to public investors through a national stock exchange, and the common stock has been traded for not less than one year, the resulting average daily closing price of the common stock over 30 consecutive trading days chosen by the commission out of the last 120 consecutive trading days before the true-up filing required by this section establishes the market value of the common stock equity in each transferee corporation.

(ii) The average book value of each transferee corporation's debt and preferred stock securities during the 30-day period chosen by the commission to determine the market value of common stock shall be added to the market value of its stock.

(iii) The market value of each transferee corporation's assets that is determined as the sum of clauses (i) and (ii) of this subparagraph shall be reduced by the corresponding net book value of the assets acquired by the transferee corporation from any entity other than the affiliated electric utility or APGC.

(iv) The market value of the assets determined from the procedures required by clauses (i), (ii), and (iii) of this subparagraph establishes the market value of the generation assets transferred by the affiliated electric utility or APGC to each separate corporation.

(C) Partial stock valuation method. The following method of market valuation using a control premium may be used to value generation assets.

(i) If, at any time after December 31, 1999, an electric utility or its APGC has transferred some or all of its generation assets, including, at the election of the electric utility or the APGC, any fuel and fuel transportation contracts related to those assets, to one or more separate affiliated or nonaffiliated corporations, at least 19%, but less than 51%, of the common stock of each corporation is spun off and sold to public investors through a national stock exchange, and the common stock has been traded for not less than one year, the resulting average daily closing price of the common stock over 30 consecutive trading days chosen by the commission out of the last 120 consecutive trading days before the filing establishes the market value of the common stock equity in each transferee corporation.

(ii) The commission may accept the market valuation to conclusively establish the value of the common stock equity in each transferee corporation or convene a valuation panel of three independent financial experts to determine whether the per-share value of the common stock sold is fairly representative of the per-share value of the total common stock equity or whether a control premium exists for the retained interest.

(iii) Should the commission elect to convene a valuation panel, the panel must consist of financial experts chosen from proposals submitted in response to commission requests from the top ten nationally recognized investment banks with demonstrated experience in the United States electric industry, as indicated by the dol-

lar amount of public offerings of long-term debt and equity of United States investor-owned electric companies over the immediately preceding three years as ranked by the publication "Securities Data" or "Institutional Investor."

(iv) If the panel determines that a control premium exists for the retained interest, the panel shall determine the amount of the control premium, and the commission shall adopt the determination, but may not use the control premium to increase the value of the assets by more than 10%.

(v) The costs and expenses of the panel, as approved by the commission, shall be paid by each transferee corporation.

(vi) The determination of the commission, based on the finding of the panel and other admitted evidence, conclusively establishes the value of the common stock of each transferee corporation.

(vii) The average book value of each transferee corporation's debt and preferred stock securities during the 30-day period chosen by the commission to determine the market value of common stock shall be added to the market value of its stock.

(viii) The market value of each transferee corporation's assets shall be reduced by the corresponding net book value of the assets acquired by the transferee corporation from any entity other than the electric utility or its APGC.

(ix) The market value of the assets resulting from the procedures required by clauses (i) - (viii) of this subparagraph establishes the market value of the generation assets transferred by the electric utility or APGC to each transferee corporation.

(D) Exchange of assets method. If, at any time after December 31, 1999, an electric utility or its APGC transfers some or all of its generation assets, including any fuel and fuel transportation contracts related to those assets, in a bona fide third-party exchange transaction, the stranded costs related to the transferred assets shall be the difference between the net book value and the market value of the transferred assets at the time of the exchange, taking into account any other consideration received or given.

(i) The market value of the transferred assets may be determined through an appraisal by a nationally recognized independent appraisal firm, if the market value is subject to a market valuation by means of an offer of sale in accordance with this subparagraph.

(ii) To obtain a market valuation by means of an offer of sale, the owner of the asset shall offer it for sale to other parties under procedures that provide broad public notice of the offer and a reasonable opportunity for other parties to bid on the asset. The owner of the asset shall provide to the commission copies of all documentation explaining and attesting to the utility's sale proposal.

(iii) The owner of the asset may establish a reserve price for any offer based on the sum of the appraised value of the asset and the tax impact of selling the asset, as determined by the commission.

(iv) Within 30 days of closing, the utility or its APGC shall provide to the commission a detailed explanation, which may be filed confidentially, of the transaction and a description of the generating unit, property boundaries, fuel and parts, emission allowances, and other general categories of items associated with the transfer, including any ancillary items related to the assets.

(2) ECOM Method. Unless an electric utility or its APGC combines all its remaining generation assets into one or more transferee corporations pursuant to paragraph (1)(B) or (C) of this subsection, the electric utility shall quantify its stranded costs for nuclear assets using the ECOM method.

(A) The ECOM method is the estimation model prepared for and described by the commission's April 1998 Report to the Texas Senate Interim Committee on Electric Restructuring entitled "Potentially Strandable Investment (ECOM) Report: 1998 Update." The methodology used in the model must be the same as that used in the 1998 report to determine the "base case."

(B) As part of the filing specified in subsection (d) of this section, the electric utility shall rerun the ECOM model using updated company specific inputs required by the model, updating the market price of electricity, and using updated natural gas price forecasts and the capacity cost based on the long-run marginal cost of the most economic new generation technology then available, as approved by the commission pursuant to subsection (e)(3) of this section. Natural gas price projections used in the model shall be forward prices of Houston Ship Channel natural gas.

(C) Growth rates in generating plant operations and maintenance costs and allocated administrative and general costs shall be benchmarked by comparing those costs to the best available information on cost trends for comparable generating plants.

(D) Capital additions shall be benchmarked using the 1.5% limitation set forth in PURA §39.259(b).

(g) Quantification of net book value of generation assets.

(1) For purposes of this section, the net book value of generation assets shall be established as of December 31, 2001, or the date a market value is established through a market valuation method under subsection (f) of this section, whichever is earlier.

(2) Net book value of generation assets consists of:

(A) The generation-related electric plant in service, less accumulated depreciation (exclusive of depreciation related to mitigation), plus generation-related construction work in progress, plant held for future use, and nuclear, coal, and lignite fuel inventories, reduced by:

(i) net mitigation;

(ii) the net book value of nuclear generation assets if quantification of ECOM related to those nuclear generation assets is determined pursuant to PURA §39.262(i); and

(iii) any generation-related invested capital recoverable through a CTC, exclusive of related carrying costs, projected to be collected through the date of the final order in the true-up proceeding.

(B) Above-market purchased power costs arising from contracts in effect before January 1, 1999, including any amendments and revisions to such contracts resulting from litigation initiated before January 1, 1999.

(i) The purchased power market value of the demand and energy included in the purchased power contracts shall be determined by using the weighted average costs of the highest three offers from a bona fide third-party transaction or transactions on the open market.

(ii) The bona fide third-party transaction or transactions on the open market shall be structured so that the above-market purchased power costs are determined pursuant to subclause (I) or (II) of this clause.

(I) A transaction may be structured so the electric utility pays a third party to assume the utility's obligations under the purchased power contract. The weighted average of the three high-

est offers received in the transaction establishes the above-market purchased power costs.

(II) A transaction may be structured so a third party pays the utility to take power under the purchased power contract. The difference between the net present value of obligations under the existing contracts at the utility's cost of capital and the weighted average of the three highest offers received in the transaction establishes the above-market purchased power costs.

(C) Deferred debits, to the extent they have not been securitized, related to a utility's discontinuance of the application of SFAS No. 71 ("Accounting for the Effects of Certain Types of Regulation") for generation-related assets if required by PURA Chapter 39.

(D) Capital costs incurred before May 1, 2003 to improve air quality to the extent they have been approved by the commission pursuant to §25.261 of this title (relating to Stranded Cost Recovery of Environmental Cleanup Costs).

(E) Any adjustments resulting from the commission's review of the TDU's, APGC's, and AREP's efforts pursuant to subsection (e)(4) of this section.

(h) True-up of final fuel balance.

(1) An APGC shall reconcile the former electric utility's final fuel balance determined under PURA §39.202(c).

(2) The final fuel balance shall be reduced by any revenues collected by the AREP under any commission-approved fuel surcharge, from the date of introduction of competition to the utility's customers through the date of the true-up filing under this section, so long as the fuel surcharge is associated with fuel costs incurred during the time period covered by the final reconcilable fuel balance.

(3) If an electric utility or its TDU or APGC is assessed by another utility in Texas a fuel surcharge after 2001 for under-recoveries occurring through the end of 2001, the surcharged utility shall add the amount of surcharges and any associated carrying costs paid after 2001 to its final fuel balance.

(4) The final fuel balance, as adjusted by paragraphs (2) and (3) of this subsection, shall include carrying costs on the positive or negative fuel balance equal to:

(A) the weighted-average cost of capital approved in the company's unbundled cost of service (UCOS) proceeding, if the period until the date of the final true-up order is greater than one year; or

(B) the rate approved in §25.236 of this title (relating to Recovery of Fuel Costs) if the period until the date of the final true-up order is one year or less.

(i) True-up of capacity auction proceeds.

(1) For purposes of the true-up required by PURA §39.262(d)(2), and as provided for under §25.381(h)(1) of this title (relating to Capacity Auctions), the APGC shall compute the difference between the price of power obtained through the capacity auctions conducted for the years 2002 and 2003 and the power cost projections for the same time period as used in the determination of ECOM for that utility in the proceeding under PURA §39.201. The difference shall be calculated according to the following formula: (ECOM market revenues - ECOM fuel costs) - ((capacity auction price x total 2002 and 2003 busbar sales) - actual 2002 and 2003 fuel costs). For purposes of this paragraph:

(A) "ECOM market revenues" shall be the sum of rows 12 through 14 for the years 2002 and 2003 in the "Plant Economics" worksheet of the ECOM model underlying the commission-approved ECOM estimate in the company's UCOS proceeding;

(B) "ECOM fuel costs" shall be the sum of rows 33 through 35 for the years 2002 and 2003 in the "Cost Partition" worksheet of the ECOM model underlying the commission-approved ECOM estimate in the company's UCOS proceeding;

(C) The "capacity auction price" shall be the APGC's total capacity auction revenues derived from the capacity auctions conducted for the years 2002 and 2003 divided by that APGC's total MWh sales of capacity auction products for the years 2002 and 2003.

(2) If, as a result of not having participated in capacity auctions pursuant to §25.381(h)(1) of this title, an APGC is unable to determine a company-specific capacity auction price, the APGC may request in its true-up application a method using prevailing capacity auction prices from other APGCs for the calculation in paragraph (1) of this subsection.

(j) True-up of PTB revenues. This subsection specifies how the PTB will be compared to prevailing market prices pursuant to PURA §39.262(e). For purposes of this subsection, the term "small commercial customer" does not include unmetered lighting accounts unless such an account has historically been treated as a separate customer for billing purposes.

(1) An AREP is not required to perform the reconciliation described in PURA §39.262(e) for the residential or small commercial customer class if the commission has determined that the AREP has reached the applicable 40% threshold requirements prior to January 1, 2004, pursuant to filing requirements listed in §25.41(l) of this title (relating to Price to Beat) applicable to that class.

(2) If an AREP has not reached the applicable 40% threshold requirements prior to January 1, 2004, for either the residential or the small commercial class, or both, the net PTB for each such class must be compared to the market price of electricity for that class in the TDU region for the period January 1, 2002 through January 1, 2004 as provided in paragraphs (3) and (4) of this subsection.

(3) The independent third party shall compute the difference between the residential net PTB and the residential market price of electricity on the last day of each calendar-year quarter for the years 2002 and 2003. The price differential for each quarter shall be multiplied by the total kWh consumed by residential PTB customers of the AREP for that quarter. The results shall be summed over the eight quarters within the period from January 1, 2002 through January 1, 2004.

(4) The independent third party shall compute the difference between the small commercial net PTB and the small commercial market price of electricity on the last day of each calendar-year quarter for the years 2002 and 2003. The price differential for each quarter shall be multiplied by the total kWh consumed by small commercial PTB customers of the AREP for that quarter. The results shall be summed over the eight quarters within the period from January 1, 2002 through January 1, 2004.

(5) For each of the residential and small commercial classes, the AREP shall credit the TDU the lesser of the amounts calculated in subparagraphs (A) and (B) of this paragraph:

(A) $150 multiplied by (the difference between the number of residential or small commercial customers, as applicable, in the TDU Region taking PTB service from the AREP on January 1, 2004 and the number of residential or small commercial customers, as applicable, outside the TDU region being served by the AREP on January 1, 2004, provided that such customers are not receiving POLR service from the AREP); or

(B) the total differential between the net PTB and the market price of electricity calculated for the applicable class under paragraph (3) or (4) of this subsection.

(6) All REPs shall provide information to the independent third party as needed for the performance of calculations set forth in paragraphs (3) and (4) of this subsection. All data used in the calculations performed by the independent third party will remain confidential but shall be subject to audit by the commission.

(7) The functions of the independent third party shall be funded by the AREPs through one or more assessments made by the commission.

(k) Regulatory assets. To the extent that any amount of regulatory assets included in a TC or CTC exceeds the amount of regulatory assets approved in a rate order which became effective on or before September 1, 1999, the commission shall conduct a review during the true-up proceeding to determine any such amounts that were not appropriately calculated or that did not constitute reasonable and necessary costs. In addition, to the extent that any amount of regulatory assets approved for securitization in a commission financing order was not subsequently included in an issuance of transition bonds, that amount of regulatory assets shall be included in the TDU/APGC true-up balance under subsection (l) of this section.

(l) TDU/APGC True-up balance.

(1) The formula to establish the true-up balance between the TDU and APGC is shown in the following table. TDUs described in subsection (d)(3) of this section and their APGCs shall insert zero for all inputs in this equation except the input entitled "Final fuel balance calculated pursuant to subsection (h)."
Figure: 16 TAC §26.263(l)(1) (No change.)

(2) For TDUs described in subsection (d)(2) of this section, the TDU/APGC true-up balance shall be compared to projected stranded costs as provided in subparagraphs (A) - (C) of this paragraph. For TDUs described in subsection (d)(3) of this section, the TDU/APGC true-up balance shall be treated as provided in subparagraph (D) of this paragraph.

(A) If the TDU/APGC true-up balance is positive, and greater than projected stranded costs, then the commission shall increase the CTC (or establish a CTC, if no CTC has previously been approved for the utility), extend the time for the collection of the CTC, or both, to enable the TDU to collect the TDU/APGC true-up balance. The utility may seek to securitize any or all of the amounts determined under this subparagraph under PURA Chapter 39, Subchapter G.

(B) If the TDU/APGC true-up balance is positive, but less than projected stranded costs, then the commission shall reduce nonbypassable delivery rates in the amount of the difference by:

(i) reducing any CTC established under PURA §39.201;

(ii) reversing, in whole or in part, the depreciation expense that has been redirected under PURA §39.256;

(iii) reducing the TDU's rates; or

(iv) any combination of clauses (i), (ii), and (iii) of this subparagraph.

(C) If the TDU/APGC true-up balance is negative, then

(i) any CTC established under PURA §39.201 shall be eliminated;

(ii) net mitigation shall be reversed until exhausted or until a zero true-up balance is achieved, and the amount of net mitigation reversed shall be returned to ratepayers by the APGC through an excess mitigation credit; and

(iii) if net mitigation is exhausted and some amount of the negative true-up balance remains, then for companies that have securitized regulatory assets, a negative CTC shall be established based upon the lesser of the absolute value of the remaining negative true-up balance or the securitization amount on which any TCs are based. If the company has been issued a financing order by the commission authorizing the securitization of regulatory assets but securitization has not yet occurred, then the negative CTC will be implemented at the time the securitization bonds are issued. If the company has not received a financing order from the commission authorizing securitization of regulatory assets, then no negative CTC shall be established for purposes of this subsection.

(D) If the TDU/APGC true-up balance is positive, then a CTC shall be imposed to enable the APGC to recover any positive fuel balance. If the TDU/APGC true-up balance is negative, then a fuel credit shall be implemented to return the over-recovered fuel balance to ratepayers.

(3) The TDU shall be allowed to recover, or shall be liable for, carrying costs on the true-up balance. This provision shall apply to all amounts the commission has authorized to be collected under this section that have not been securitized. Carrying costs on the unrecovered true-up balance shall be calculated from January 1, 2002, until the true-up balance is fully recovered. Based on the filing described below that is made within 30 days of the effective date of this rule, carrying costs shall be calculated using an interest rate determined as follows.

(A) The TDU shall file an application to adjust the carrying costs and amend its CTC tariff on a prospective basis in conformance with this paragraph within 30 days of the effective date of an amendment to this paragraph. The establishment of the interest rate used to calculate carrying charges shall be based upon the following:

(i) The weighted average of the TDU's unadjusted historical cost of debt (HC) and an adjusted form of the TDU's marginal cost of debt (MC), with the weightings based on the utility's most recently authorized capital structure. The HC component shall be the cost of debt as determined in a final commission order, provided that the order was entered within three years of the effective date of this rule, for a rate proceeding in which the TDU's cost of debt was explicitly addressed or can be determined based upon the order's authorized weighted-average cost of capital (overall rate of return on invested capital), proportions of debt and equity, and allowed return on equity. The MC component shall be based upon the average yield for long-term bonds of public utilities with the TDU's current credit rating during the three-month period preceding the filing, as published in *Moody's Credit Perspectives* (or a similar publication if *Moody's Credit Perspectives* is not available). Additionally, the MC component shall be adjusted--*i.e.*, grossed-up--for the effects of federal income taxes. The following formula shall be used to determine the weighted-average carrying cost described above: CTC Carrying Charge Rate = MC * Equity Proportion of Most Recently Authorized Capital Structure * 1/(1-Tax Rate) + HC * Debt Proportion of Most Recently Authorized Capital Structure.

(ii) If the commission, within three years prior to the effective date of this rule, did not enter a final order in a rate proceeding that addresses the TDU's cost of debt, the HC component used in the interest rate determination described in the preceding clause shall be based upon the cost of debt reported in the utility's most recent Earnings Monitoring Report filed pursuant to §25.73 of this title (relating to Financial and Operating Reports), adjusted for known and measurable changes.

(B) In each rate case for the TDU, the calculation of carrying costs on the TDU's unsecuritized true-up balance shall be reviewed and adjusted to reflect authorized changes in the TDU's capital structure and cost of debt. Further, to reflect the effect of the CTC carrying charge rate across the entirety of the TDU's recoverable regulated assets, a composite rate of return incorporating the CTC carrying charge rate may be applied to both the unsecuritized true-up balance and the TDU rate base. The composite rate of return shall be calculated as follows: Composite Pre-Tax Rate of Return = CTC Carrying Charge Rate * Unsecuritized True-up Balance / (Unsecuritized True-up Balance + TDU Rate Base) + TDU Authorized Pre-Tax Weighted-Average Cost of Capital * TDU Rate Base / (Unsecuritized True-up Balance + TDU Rate Base).

(m) TDU/AREP true-up balance. The TDU shall bill the AREP for, and the AREP shall remit to the TDU, the amount calculated pursuant to subsection (j) of this section, plus carrying costs. Carrying costs shall be calculated in accordance with subsection (l) of this section and shall be calculated for the period of time from the date of the true-up final order until fully recovered. The commission may reduce the TDU's rates to reflect the amounts due from the AREP.

(n) Proceeding subsequent to the true-up.

(1) The TDU shall file an application to adjust its rates within 60 days following the issuance of a final, appealable order in its true-up proceeding. In the proceeding, the commission may adjust the TDU's rates and any CTC, in accordance with PURA §39.262(g), and any excess mitigation credit. The commission may also allocate the recovery responsibility for such rates and any CTC to the TDU's customer classes.

(2) In the proceeding, the commission shall also consider adopting remittance standards, if necessary, with respect to the credits or bills as among the TDU, the APGC, and the AREP.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 30, 2006

TRD-200603561
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: July 20, 2006
Proposal publication date: January 27, 2006
For further information, please call: (512) 936-7223

♦ ♦ ♦

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS
SUBCHAPTER P. TEXAS UNIVERSAL SERVICE FUND

16 TAC §26.420

The Public Utility Commission of Texas (commission) adopts an amendment to §26.420, relating to Administration of the Texas Universal Service Fund (TUSF), with no changes to the proposed text as published in the April 14, 2006, issue of the *Texas Register* (31 TexReg 3142). This adopted amendment revises the existing rule to reflect the current assessment methodology adopted by the commission in Docket No. 21208 (see Docket No. 21208, Order Regarding TUSF Assessment of Intrastate Telecommunications Services Receipts, July 29, 2004). The Order in Docket No. 21208 was adopted in response to the decision of the United States Court of Appeals for the Fifth Circuit in *AT&T Corp. v. Public Utility Commission of Texas*, 373 F. 3d 641 (5th Cir. 2004) (AT&T Decision). This amendment is adopted under Project Number 28708.

§26.420(f)(2)(E) and §26.420(f)(6)

The commission received comments on the proposed amendment from the Office of the Attorney General of the State of Texas (State). The State supported the proposed amendments, and in particular §26.420(f)(2)(E) and §26.420(f)(6), as they retain the State's current exempt status by basing the assessment on taxable receipts. The State asserted that the continuation of the current policy of exempting state agencies from a TUSF surcharge is ultimately protective of consumer and taxpayer interests. The State proposed no changes to the amendment.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §56.023, which requires the commission to adopt procedures to fund the TUSF.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §56.023.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603568
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: July 20, 2006
Proposal publication date: April 14, 2006
For further information, please call: (512) 936-7223

♦ ♦ ♦

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 101. ASSESSMENT
SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING IMPLEMENTATION OF TESTING PROGRAM

19 TAC §101.3001, §101.3005

The Texas Education Agency (TEA) adopts an amendment to §101.3001 and new §101.3005, concerning implementation of the testing program. The amendment and new section are adopted without changes to the proposed text as published in the May 19, 2006, issue of the *Texas Register* (31 TexReg 4156) and will not be republished. Section 101.3001 addresses implementation of assessment instruments. Adopted new §101.3005 addresses required test administration procedures

and training activities. The purpose of the adopted rule action is to clarify the commissioner's authority to develop and implement test administration procedures and training activities to ensure the security, validity, and reliability of the assessment program as required by the Texas Education Code (TEC), §39.023(i).

The TEC, §39.023, requires the commissioner of education to adopt rules for implementing the testing program established by the State Board of Education in 19 TAC Chapter 101, Subchapters A-E. Senate Bill (SB) 103, Section 9, 76th Texas Legislature, 1999, requires the commissioner of education to adopt rules for the implementation of the TEC, §39.023. In accordance with the TEC, Chapter 39, Subchapter B, and SB 103, Section 9, the commissioner adopted rules concerning implementation of the testing program in 19 TAC Chapter 101, Subchapter CC, to be effective February 16, 2003. Rules in this subchapter were revised, effective February 2005, to clarify transitional issues related to the Texas Assessment of Knowledge and Skills (TAKS), as specified by the 76th Texas Legislature, 1999, and to establish rules for implementation of the Grade 8 science test required by the 78th Texas Legislature, 2003.

The TEC, §39.023(i), requires that each assessment instrument adopted under the TEC, Chapter 39, Subchapter B, be reliable and valid and must meet any applicable federal requirements for measurement of student progress. The adopted revisions to 19 TAC Chapter 101, Subchapter CC, add new 19 TAC §101.3005 and amend the section title in 19 TAC §101.3001, as follows.

The new 19 TAC §101.3005, Required Test Administration Procedures and Training Activities to Ensure Validity, Reliability, and Security of Assessments, is added to clarify in rule the commissioner's authority to develop and implement test administration procedures and required training activities to ensure the validity, reliability, and security of assessments administered under the TEC, Chapter 39, Subchapter B. The new section also clarifies in rule the authority for the commissioner to establish test administration procedures and required training activities that support the standardization of the test administration process. These test administration procedures shall be delineated in the test administration materials provided to districts and charter schools annually. The new section clarifies the commissioner's authority to require training activities to ensure that testing personnel have the necessary skills and knowledge required to administer assessment instruments in a valid, standardized, and secure manner. The commissioner may require evidence of the successful completion of training activities.

The adopted amendment to 19 TAC §101.3001 only changes the rule's title to read "Implementation of Assessment Instruments." No changes were made to the text of the rule.

The following public comment on the revisions to 19 TAC Chapter 101, Subchapter CC, was received from George West Independent School District (ISD), Northside ISD, and Fort Bend ISD.

Comment: A principal from George West ISD and the district test coordinators from Northside ISD and Fort Bend ISD suggested that the agency develop PowerPoint presentations with all of the relevant information test administrators and campus coordinators need during test administrations that districts and campuses could use to train their test administrators.

Agency Response: The agency agrees that training materials are useful. Several PowerPoint presentations for the statewide assessment training for education service centers and the largest districts; the training on Texas Observation Protocols; the Admission, Review, and Dismissal (ARD) Committee Training; and training on packaging of assessment materials are already available and posted on the Student Assessment Division website. Districts and campuses may use these presentations and other materials as needed to assist with their training sessions. No changes were necessary to the rules as proposed.

The amendment and new section are adopted under Senate Bill 103, Section 9, 76th Texas Legislature, 1999 (Acts of the 76th Texas Legislature, 1999, Chapter 397), and Texas Education Code, §39.023, which authorize the commissioner of education to adopt rules for the implementation of the Texas Education Code, §39.023.

The amendment and new section implement the Texas Education Code, §39.023, and Senate Bill 103, Section 9, 76th Texas Legislature, 1999 (Acts of the 76th Texas Legislature, 1999, Chapter 397).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603567
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: July 20, 2006
Proposal publication date: May 19, 2006
For further information, please call: (512) 475-1497

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 575. PRACTICE AND PROCEDURE

22 TAC §575.25

The Texas Board of Veterinary Medical Examiners adopts amendments to §575.25 concerning Recommended Schedule of Sanctions without change to the proposed text as published in the *Texas Register* on March 10, 2006 (31 TexReg 1585). The amended section reflects the changes to the Veterinary Licensing Act made by the 79th Texas Legislature that raised the maximum amount of administrative penalties that the Board can impose from $2,500.00 for each violation not related to a controlled substance to $5,000.00 per day for each violation of any kind. Other minor changes were incorporated to assure full compliance with the legislative directives.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the authority of §801.151(a) of the Veterinary Licensing Act, Occupations Code, which gives the Board authority to adopt rules necessary to administer the Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 27, 2006.

TRD-200603451
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: July 17, 2006
Proposal publication date: March 10, 2006
For further information, please call: (512) 305-7555

22 TAC §575.27

The Texas Board of Veterinary Medical Examiners adopts amendments to §575.27 concerning Complaints--Receipt, Investigation and Disposition, with one change to the proposed text as published in the *Texas Register* on March 10, 2006 (31 TexReg 1586). The amended section reflects changes to the Veterinary Licensing Act made by the 79th Texas Legislature. Under the new procedures, two veterinarian members of the Board, instead of one, will initially review all complaints that potentially involve medical issues. For complaints that do not involve medical issues, a committee of the Board's staff will review those complaints and propose a settlement to the veterinarian who is subject to the complaint. An informal conference is available for those veterinarians who do not wish to accept the staff's settlement offer. For complaints involving medical issues, an informal conference is held to hear the case, and two veterinarian members of the Board and one public member must attend.

The purpose of the increased participation by Board members in the review of cases is to assure that cases are considered from more than one viewpoint, and thus increase the confidence of the public that the cases have been subject to a full and fair review.

Subsection (e) of the section has been amended to address the consideration of contested cases at the State Office of Administrative Hearings (SOAH). New language addresses the negative consequences of a licensee failing to respond to notice of scheduled SOAH hearings. This amended subsection clearly states that if a licensee fails to appear at a SOAH hearing, the Board may ask that the administrative law judge issue a default decision in favor of the Board.

In accordance with the legislative changes, the section is amended to allow restitution of expenses incurred by a complainant where a licensee is found to have improperly diagnosed and/or treated the complainant's animal. The amount of restitution may be in lieu of or in addition to other sanctions imposed on the licensee. The Board and public benefit by having another method of imposing sanctions.

One comment was received from a Board member, who asked that the amendments clarify what kind of violations do not involve "medical judgment or practice." Accordingly, subsection (c)(8)(B) is expanded to give two examples of non-medical practices: continuing education and controlled substances certificates. The addition is for clarification purposes.

The amendments are adopted under the authority of §801.151(a) of the Veterinary Licensing Act, Occupations Code, which gives the Board authority to adopt rules necessary to administer the Act.

§575.27. Complaints--Receipt, Investigation and Disposition.

(a) Complaints against licensees.

(1) All complaints filed by the public against board licensees must be in writing on a complaint form provided by the board and signed by the complainant. If a complaint is transmitted to the board orally or by means other than in writing and the complaint alleges facts showing a continuing or imminent threat to the public welfare, the requirement of a written complaint may be waived until later in the investigative process.

(2) Complaints by the board's enforcement section shall be initiated by the opening of a complaint file.

(3) The board shall maintain a log of complainants to whom the board sends a complaint form.

(4) Anonymous written complaints will not be investigated, but will be logged and filed for information purposes only.

(5) The board shall utilize violation code numbers to distinguish between categories of complaints.

(b) Complaints against non-licensees. Complaints against persons alleged to be practicing veterinary medicine without a license may be investigated and resolved informally by the executive director. Complaints not resolved by the executive director may be referred by the board to a local prosecutor or the attorney general for legal action.

(c) Investigation of complaints.

(1) The policy of the board is that the investigation of complaints shall be the primary concern of the board's enforcement program, and shall take precedence over all other elements of the enforcement program, including compliance inspections.

(2) The board shall investigate complaints based on the following allegations, in order of priority:

(A) acts or omissions, including those related to substance abuse, that may constitute a continuing and imminent threat to the public welfare;

(B) acts or omissions of a licensee that resulted in the death of an animal;

(C) acts or omissions of a licensee that contributed to or did not correct the illness, injury or suffering of an animal; and

(D) all other act and omissions that do not fall within categories (A) - (C) of this paragraph.

(3) Upon receipt of a complaint, a letter of acknowledgment will be promptly mailed to the complainant.

(4) Complaints will be reviewed every thirty (30) days to determine the status of the complaint. Parties to a complaint will be informed on the status of a complaint at least on a quarterly basis.

(5) Upon receipt of a complaint, a board investigator shall review it and may interview the complainant to develop additional information. If the investigator concludes that the complaint resulted from a misunderstanding, is outside the jurisdiction of the board, or is without merit, the investigator shall recommend through the director of enforcement to the executive director that the investigation be closed. If the executive director concurs with the recommendation, the complainant will be so notified, the investigation will be closed, and the complaint file will be maintained in a secure file in the board office. If the executive director does not concur with the recommendations, the investigation will proceed.

(6) If the executive director returns the complaint to the investigator with a notation of non-concurrence under paragraph (5) of

this subsection, or if the executive director concurs with the investigator's determination that a potential violation exists, the licensee is furnished with a copy of the complaint, unless the executive director determines that an undercover investigation is required. If no undercover investigation is required, the investigator shall contact the licensee in writing, and request any patient records or other pertinent documents deemed necessary for the investigation. The investigator may schedule an interview with the licensee. The investigator may request a written narrative statement from the licensee.

(7) After the licensee's response to the complaint is received, further investigation may be necessary to corroborate the information provided by the complainant and the licensee. During the investigation, the investigator shall interview the complainant. The investigator may request additional medical opinions, supporting documents, and interviews with other witnesses.

(8) Upon the completion of an investigation, the director of enforcement shall present to the executive director a report of investigation (ROI) and a conclusion as to the probability that a violation(s) exists.

(A) If the executive director determines from the ROI that the probability of a violation involving medical judgment or practice exists, the director of enforcement shall forward a copy of the complaint file to the board secretary and another board member (the "veterinarian members") who will determine whether or not the complaint should be closed, further investigation is warranted, or if the licensee should be invited to respond to the complaint at an informal conference at the board offices.

(B) If the probable violation does not involve medical judgment or practice (example: administrative matters such as continuing education and federal and state controlled substances certificates), the executive director shall forward the complaint file to a committee of the executive director, director of enforcement, the investigator assigned to the complaint, and general counsel (the "staff committee"), which shall determine whether or not the complaint should be dismissed, investigated further, or settled.

(C) If the veterinarian members determine that a violation has not occurred, the executive director or director of enforcement shall notify the complainant and licensee in writing of the conclusion and that the complaint is dismissed.

(D) If the veterinarian members conclude that a probable violation(s) exists, the executive director shall invite the licensee in writing to an informal conference to discuss the complaint made against the licensee. If the veterinarian members cannot agree to dismiss or refer the complaint to an informal conference, the complaint will be automatically referred to an informal conference. The letter invitation to the licensee must include a list of the specific allegations of the complaint.

(E) A complaint considered by the staff committee shall be referred to an informal conference if:

(i) the staff committee determines that the complaint should not be dismissed or settled;

(ii) the staff committee is unable to reach an agreed settlement; or

(iii) the licensee who is the subject of the complaint requests that the complaint be referred to an informal conference.

(d) Informal conferences

(1) The informal conference is the last stage in the investigation of a complaint. The licensee has the right to waive his or her attendance at the conference. The licensee may be represented by counsel.

(2) The board may be represented at the informal conference by a conference committee of the executive director, the veterinarian members and a public member of the board (if the complaint involves medical judgment or practice), the director of enforcement, the investigator assigned to the complaint, and the board's general counsel. The complainant and the licensee and the licensee's legal counsel may attend the conference. Any other attendees are allowed at the discretion of the executive director. The executive director or the director of enforcement shall conduct the conference.

(3) Subject to the discretion of the executive director, the following procedure will be followed at the informal conference. The executive director shall explain the purpose of the conference and the rights of the participants, lead the discussion of the allegations of the complaint, and explain the possible courses of action at the conclusion of the conference. The licensee will be asked to respond to the allegations. The complainant will be allowed to make comments relevant to the allegations. Comments of the licensee and complainant must be addressed to the person conducting the conference and not to each other. In the interest of maintaining decorum, the licensee or complainant may be asked to leave the room while the other is talking with the committee. The committee may ask questions of the licensee and complainant in order to fully develop the complaint record.

(4) At the conclusion of the informal conference, the conference committee shall determine if a violation has occurred. If the conference committee determines that a violation has not occurred, the conference committee will dismiss the complaint, and will advise all parties of the decision and the reasons why the complaint was dismissed.

(5) If the conference committee determines that a violation has occurred and that disciplinary action is warranted, the executive director will advise the licensee of the alleged violations and offer the licensee a settlement in the form of an agreed order that specifies the disciplinary action and monetary penalty. With the agreement of the licensee, the conference committee may recommend that the licensee refund an amount not to exceed the amount the complainant paid to the licensee instead of or in addition to imposing an administrative penalty on the licensee. The executive director must inform the licensee that the licensee has a right to a hearing before an administrative law judge on the finding of the occurrence of the violation, the type of disciplinary action, and/or the amount of the recommended penalty.

(6) Within 20 days after the date the licensee receives the settlement offer, the licensee must submit a written response to the board

(A) accepting the settlement offer and recommended disciplinary action, or

(B) requesting a hearing before an administrative law judge.

(7) If the licensee accepts the settlement offer by signing the agreed order, the agreed order will be docketed for board action at the next regularly scheduled board meeting. The board may approve the agreed order as docketed, approve the agreed order with amendments, or reject the agreed order. If the board approves the agreed order with amendments, the executive director shall mail the amended agreed order to the licensee and the licensee shall have fourteen (14) days from receipt to accept the amended agreed order by signing and returning it to the board. If a licensee does not sign an amended agreed order or does not respond within the fourteen (14) days, the complaint will be scheduled for a hearing before an administrative law judge. If

the board rejects the agreed order, the complaint may be scheduled for a hearing before an administrative law judge, or the board may direct the executive director to take other appropriate action.

(e) Contested case hearing

(1) If the licensee declines the board's settlement offer, or if the licensee fails to respond timely to the offer, or if the board rejects a proposed agreed order, the investigator of the complaint shall prepare a complaint affidavit containing the allegations against the licensee. The signed and notarized complaint affidavit will then be reviewed by the board's legal counsel and signed by the executive director. The date the executive director signs the complaint affidavit is the official date of filing the complaint affidavit with the board. The complaint affidavit shall serve as the board's pleading in a contested case. At least ten (10) days prior to a scheduled hearing, the complaint affidavit and notice of hearing shall be served on the licensee as set out in subsection (e) (3) (A) of this section.

(2) The executive director shall submit to the State Office of Administrative Hearings (SOAH) a completed Request to Docket Case requesting SOAH to set a hearing and/or assign an administrative law judge to the contested case. The board shall provide notice of the time, date, and place of the hearing to the licensee. Following issuance of a proposal for decision by the administrative law judge, the board by order may find that a violation has occurred and impose disciplinary action, or find that no violation has occurred. The board shall promptly advise the complainant of the board's action.

(3) Notice of SOAH hearing; continuance and default

(A) The board shall send notice of a contested case hearing before SOAH to the licensee's last known address as evidenced by the records of the board. Notice shall be given by first class mail, certified or registered mail, or by personal service.

(B) If the licensee fails to timely enter an appearance or answer the notice of hearing, the board is entitled to a continuance at the time of the hearing. If the licensee fails to appear at the time of the hearing, the board may move either for dismissal of the case from the SOAH docket, or request that the administrative law judge issue a default proposal for decision in favor of the board.

(C) Proof that the licensee has evaded proper notice of the hearing may also be grounds for the board to request dismissal of the case or issuance of a default proposal for decision in favor of the board.

(f) Contingency. The board president shall appoint another licensee board member to assume the duties of the board secretary in the complaint process in the event the board secretary is unable to serve in the capacity set out in this section.

(g) Report to the board of dismissed complaints. The executive director or the director of enforcement shall advise the board at each scheduled meeting of the complaints dismissed since the last meeting. The information will consist of a summary of the allegations, investigation conducted, reasons for dismissal, and file number.

(h) Use of Private Investigators. The executive director may approve the use of private investigators to assist in investigation of complaints where the use of board investigators is not feasible or economical or where private investigators could provide valuable assistance to the board investigators. Private investigators may be utilized in cases involving honesty, integrity and fair dealing; reinstatement applications; solicitation; fraud; dangerous drugs and controlled substances; and practicing veterinary medicine without a license. Private investigators will be utilized in accordance with existing purchasing rules of the Texas Building and Procurement Commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 27, 2006.

TRD-200603453
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: July 17, 2006
Proposal publication date: March 10, 2006
For further information, please call: (512) 305-7555

♦ ♦ ♦

22 TAC §575.31

The Texas Board of Veterinary Medical Examiners ("Board") adopts new section §575.31 concerning Alternative Dispute Resolution (ADR) without change to the proposed text as published in the *Texas Register* on March 10, 2006 (31 TexReg 1588). The section reflects legislation passed by the 79th Legislature requiring the Board to adopt a policy encouraging the use of ADR in resolving internal and external disputes. The section clearly states this policy, appoints the Board's general counsel as the dispute resolution coordinator to assure that the policy is carried out, and informs the public of the steps that need to be taken to request ADR. Other issues are addressed to insure that the public is fully informed of the new procedures.

No comments were received regarding adoption of the new section.

The section is adopted under the authority of §801.151(a) of the Occupations Code which gives the Board authority to adopt rules necessary to administer the Veterinary Licensing Act, and §801.162 of the Occupations Code which directs the Board to develop and implement a policy to encourage the use of ADR.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 27, 2006.

TRD-200603454
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: July 17, 2006
Proposal publication date: March 10, 2006
For further information, please call: (512) 305-7555

♦ ♦ ♦

22 TAC §575.32

The Texas Board of Veterinary Medical Examiners ("Board") adopts new §575.32 concerning Negotiated Rulemaking without change to the proposed text as published in the *Texas Register* on March 10, 2006 (31 TexReg 1589). The section reflects legislation passed by the 79th Legislature requiring the Board to adopt a policy encouraging the use of negotiated rulemaking in adopting Board rules. The section clearly states this policy, appoints the Board's general counsel as the negotiated rulemaking coordinator to assure that the policy is carried out, and informs

the public of the steps that need to be taken to implement the policy in a given situation.

No comments were received regarding adoption of the new section.

The section is adopted under the authority of §801.151(a) of the Occupations Code which gives the Board authority to adopt rules necessary to administer the Veterinary Licensing Act, and §801.162 of the Occupations Code which directs the Board to develop and implement a policy to encourage the use of negotiate rulemaking.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 27, 2006.

TRD-200603455
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: July 17, 2006
Proposal publication date: March 10, 2006
For further information, please call: (512) 305-7555

♦ ♦ ♦

CHAPTER 577. GENERAL ADMINISTRATIVE DUTIES

SUBCHAPTER A. BOARD MEMBERS AND MEETINGS--DUTIES

22 TAC §577.2

The Texas Board of Veterinary Medical Examiners adopts amendments to §577.2 concerning Meetings without change to the proposed text as published in the *Texas Register* on March 10, 2006 (31 TexReg 1590). The amended section governs the conduct of the Board's meetings. The section is changed to allow the Board to efficiently conduct its meeting by allowing it to direct the location and placement of equipment in the meeting room, while ensuring the public's right to record or videotape a Board proceeding without undue restrictions.

No comments were received regarding adoption of the amended section.

The amendments are adopted under the authority of §801.151(a) of the Texas Occupations Code which gives the Board authority to adopt rules necessary to administer the Veterinary Licensing Act and §551.023 of the Government Code which authorizes agencies to adopt reasonable rules for the placement of recording equipment and the manner in which the recording is conducted.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 27, 2006.

TRD-200603456
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: July 17, 2006
Proposal publication date: March 10, 2006
For further information, please call: (512) 305-7555

♦ ♦ ♦

PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING

CHAPTER 661. GENERAL RULES OF PROCEDURES AND PRACTICES

SUBCHAPTER D. APPLICATIONS, EXAMINATIONS, AND LICENSING

22 TAC §661.52

The Texas Board of Professional Land Surveying (TBPLS) adopts new §661.52, concerning Inactive Status, without changes to the proposed text as published in the February 3, 2006, issue of the *Texas Register* (31 TexReg 645) and will not be republished.

The new rule will clarify the procedures for implementing §1071.263 of the Professional Land Surveying Practices Act.

No comments were received regarding the new rule.

The new rule is adopted pursuant to §1071.151, Title 6, Occupations Code, Subtitle C, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties and to comply with Sunset Commission requirements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 26, 2006.

TRD-200603444
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: July 16, 2006
Proposal publication date: February 3, 2006
For further information, please call: (512) 239-5263

♦ ♦ ♦

22 TAC §661.55

The Texas Board of Professional Land Surveying (TBPLS) adopts new §661.55, concerning Surveying Firms, without changes to the proposed text as published in the March 3, 2006, issue of the *Texas Register* (31 TexReg 1408) and will not be republished.

The new rule will clarify §1071.352 and §1071.353 regarding the responsibility of firms offering land surveying services.

No comments were received regarding the new rule.

The new rule is adopted pursuant to §1071.151, Title 6, Occupations Code, Subtitle C, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties and to comply with Sunset commission requirements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 26, 2006.

TRD-200603445
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: July 16, 2006
Proposal publication date: March 3, 2006
For further information, please call: (512) 239-5263

♦ ♦ ♦

SUBCHAPTER E. CONTESTED CASES

22 TAC §661.63

The Texas Board of Professional Land Surveying (TBPLS) adopts a new rule §661.63, concerning Frivolous Complaints, without changes to the proposed text as published in the February 3, 2006, issue of the *Texas Register* (31 TexReg 646) and will not be republished.

The new rule will clarify the definition of frivolous and harassment as used in §1071.204(f) of the Professional Land Surveying Practices Act.

No comments were received regarding the new rule.

The new rule is adopted pursuant to §1071.151, Title 6, Occupations Code, Subtitle C, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties and to comply with Sunset Commission requirements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 26, 2006.

TRD-200603442
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: July 16, 2006
Proposal publication date: February 3, 2006
For further information, please call: (512) 239-5263

♦ ♦ ♦

CHAPTER 663. STANDARDS OF RESPONSIBILITY AND RULES OF CONDUCT
SUBCHAPTER B. PROFESSIONAL AND TECHNICAL STANDARDS

22 TAC §663.18

The Texas Board of Professional Land Surveying (TBPLS) adopts an amendment to §663.18, concerning Certification, without changes to the proposed text as published in the February 3, 2006, issue of the *Texas Register* (31 TexReg 647) and will not be republished. This section identifies what the registered land surveyor can certify to.

The amendment will further clarify what the surveyor may certify to.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to §1071.151, Title 6, Occupations Code, Subtitle C, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 26, 2006.

TRD-200603443
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: July 16, 2006
Proposal publication date: February 3, 2006
For further information, please call: (512) 239-5263

♦ ♦ ♦

PART 31. TEXAS STATE BOARD OF EXAMINERS OF DIETITIANS

CHAPTER 711. DIETITIANS

22 TAC §§711.1 - 711.3, 711.6 - 711.8, 711.12, 711.14, 711.17, 711.19

The Texas State Board of Examiners of Dietitians (board) adopts amendments to §§711.1 - 711.3, 711.6 - 711.8, 711.12, 711.14, 711.17, and 711.19, concerning the licensure and regulation of dietitians. Section 711.3 is adopted with changes to the proposed text as published in the January 13, 2006, issue of the *Texas Register* (31 TexReg 231). Sections 711.1, 711.2, 711.6 - 711.8, 711.12, 711.14, 711.17, and 711.19 are adopted without changes, and the sections will not be republished.

The amendments are adopted pursuant to statutory changes to the Occupations Code, Chapter 701, regarding House Bill 1155, passed during the 79th Legislature, 2005. Each section was reviewed in order to ensure clarity; to ensure that the rules reflect current legal, policy, and operational considerations; to ensure accuracy; to improve draftsmanship; and to make the rules more accessible, understandable, and usable, to the extent possible.

SECTION BY SECTION SUMMARY

The amendment to §711.1 reflects the current name of the agency.

The amendment to §711.2 clarifies travel reimbursement for board members and the process for the election of presiding officers of the board.

The amendment to §711.3 adds new language that allows hospital dietitians to take/transcribe dietary and parental nutrition orders under the provision of protocols approved by the governing bodies of these institutions.

The amendment to §711.6(g)(3) specifies the examination is the "licensing" examination.

Section 711.6(h) was deleted because the subsection is a duplicate rule to §711.6(b).

The amendment to §711.7 adds new language to require the Texas Jurisprudence Exam.

The amendment to §711.8 adds language regarding failure to show proof of the Texas Jurisprudence exam will be reason for disapproval of a license. Also, procedures for processing applications increased from 14 working days to 20 working days.

Regarding §711.12(7), new language was added to allow refusal to renew for non-payment of an administrative penalty imposed under the Act.

The amendment to §711.14 clarifies the maximum amount an administrative penalty may be per violation, per day and the ability to issue a cease and desist order.

The amendment to §711.17 adds new language to require the Texas Jurisprudence Exam for licensure renewal.

New language was added to §711.19 to allow the board to order a license holder to issue a refund to a consumer resulting from an informal conference instead of or in addition to an administrative penalty.

COMMENTS

Comment: Regarding §711.3, sixty commenters support the rule because they believe that the rule is within a licensed dietitian's scope of practice and that it clearly defines the settings, situations, and circumstances in which a licensed dietitian may accept a physician's verbal order and order lab tests consistent with medical direction or authorization.

Response: The board agrees with the commenters that §711.3(c)(2) and (3) should be adopted in that the rule serves to more clearly define a licensed dietitian's scope of practice, not expand it. The board also notes that several of the commenters originally proposed the rule to the committee through a Petition for Rulemaking. No change was made as a result of this comment.

Comment: Regarding §711.3(c)(2) and (3), one commenter, the Texas Medical Association, opposed the rule claiming that the rule is not based upon current authority contained in the Act that regulates dietitians. Additionally, the commenter notes that the fact that the Texas Legislature failed to pass similar legislation is evidence that the legislature did not intend for dietitians to have such authority.

With regard to §711.3(c)(2), the commenter complains that medication orders and medical protocols are not within the realm of the dietitian and should not be added by rule.

With regard to §711.3(c)(3), the commenter argues that the term "medical nutrition therapy" is not defined and that the definition appears on its face to permit the exercise of medical act and judgment neither of which are permitted the dietitian by statute.

Response: The board disagrees and believes that the rule provides greater clarity and definition to the scope of practice of licensed dietitians as contemplated by Occupations Code, Chapter 701, as well as, mirrors current health care practice settings which involve therapeutic diet orders are being issued in one of three ways: physician delegation; verbal orders; or hospital nutrition order writing protocol or policy.

Additionally, the board believes that it has the general legal authority under Occupations Code, §701.152 to adopt rules to clarify and further define the statutory provisions for which it is responsible notwithstanding the failure of the legislature to pass similar legislation during the 79th legislative session.

The board believes that §711.3(c)(2) which would allow a dietitian to "accept, transcribe into a patient's medical record, and transmit to another authorized health care professional, the verbal or electronically transmitted orders of a physician relating to the implementation or provision of medical nutrition therapy or other related protocols for an individual patient or group of patients" is within the scope of practice of a licensed dietitian, and has in fact been common practice in this state and the nation in ESRD facilities and hospitals. Such practice is approved by other credentialing and regulatory bodies such as the Joint Commission on Accreditation of Health Organization ("JCAHO") and the Centers for Medicare and Medicaid Services ("CMS"). Second, all of the acts by a licensed dietitian under this rule are to be performed only in accordance with the Medical Practice Act and the rules of the Texas Medical Board, and consistent with medical direction or authorization. Third, the rule has the additional limitations in that it relates only to "the acts of "accepting, transcribing...and transmitting, and, only to those orders relating to "the implementation or provision of medical nutrition therapy." Fourth, the Texas Board of Nurses does not consider it a violation of the Nurse Practice Act for a nurse to receive and act upon a physician's medication treatment order when that order is relayed to the nurse through another person acting as the agent of the physician.

The board believes that §711.3(c)(3) which would allow a licensed dietitian, "acting within the scope of his or her license and consistent with medical direction or authorization, to order medical laboratory tests relating to the implementation or provision of medical nutrition therapy and related medical protocols for individual patients or groups of patients", is within the scope of practice of a licensed dietitian. Contrary to the commenter's suggestion that the rule would allow a licensed dietitian to diagnose and treat patients without a physician ever seeing the patient, the subsection has a built-in safeguard in that the medical direction or authorization shall be provided through "a physician's order, or a standing medical order; or standing delegation order; or medical protocol."

Although the subsection does not define the term "medical nutrition therapy", the term is understood in the profession and in the medical fields in nutrition as a commonly used form of therapy, such as in end stage renal disease facilities. Significantly, the term is defined in the federal Social Security Act, which authorizes Medicare reimbursement of registered dietitians for "medical nutrition therapy" in the treatment of certain diseases.

Section 711.3(c)(3) speaks only to the performance of specific acts, which are to be performed only upon the authorization of a physician(s) in accordance with the Medical Practice Act and Texas Medical Board rules. No change was made as a result of this comment.

The Department of State Health Services staff, on behalf of the board, provided a comment concerning the proposal.

Change: Concerning §711.3(c)(2), first sentence, the word "patent" was corrected to the word "patient" to read "an individual patient".

STATUTORY AUTHORITY

The amendments are authorized by Occupations Code, §701.152, which authorizes the board to adopt rules necessary for the performance of the board's duties.

§711.3. The Profession of Dietetics.

(a) The rules relating to the profession of dietetics shall be to establish the standards of professional and ethical conduct required of a licensee.

(b) Dietetics. The profession of dietetics includes six primary areas of expertise: clinical, educational, management, consultation, community and research; and includes without limitation the development, management, and provision of nutrition services, as follows:

(1) planning, developing, controlling, and evaluating food service systems;

(2) coordinating and integrating clinical and administrative aspects of dietetics to provide quality nutrition care;

(3) establishing and maintaining standards of food production, service, sanitation, safety, and security;

(4) planning, conducting, and evaluating educational programs relating to nutrition care;

(5) developing menu patterns and evaluating them for nutritional adequacy;

(6) planning layout designs and determining equipment requirements for food service facilities;

(7) developing specifications for the procurement of food and food service equipment and supplies;

(8) developing and implementing plans of nutrition care for individuals based on assessment of nutrition needs;

(9) counseling individuals, families, and groups in nutrition principles, dietary plans, and food selection and economics;

(10) communicating appropriate diet history and nutrition intervention data through medical record systems;

(11) participating with physicians and allied health personnel as the provider of nutrition care;

(12) planning, conducting or participating in, and interpreting, evaluating, and utilizing pertinent current research related to nutrition care;

(13) providing consultation and nutrition care to community groups and identifying and evaluating needs to establish priorities for community nutrition programs;

(14) publishing and evaluating technical and lay food and nutrition publications for all age, socioeconomic, and ethnic groups;

(15) planning, conducting, and evaluating dietary studies and participating in nutrition and epidemiologic studies with a nutrition component.

(c) Provider of nutrition services.

(1) A person licensed by the board is designated as a health care provider of nutrition services.

(2) A licensed dietitian, acting within the scope of his or her license and consistent with medical direction or authorization as provided in this section, may accept, transcribe into a patient's medical record or transmit verbal or electronically-transmitted orders, including medication orders, from a physician to other authorized health care professionals relating to the implementation or provision of medical nutrition therapy and related medical protocols for an individual patient or group of patients. In a licensed health facility, the medical direction or authorization shall be provided, as appropriate, through a physician's order, or a standing medical order, or standing delegation order, or medical protocol issued in accordance with Occupations Code, Chapter 157, Subchapter A, and rules adopted by the Board of Medical Examiners implementing the subchapter. In a private practice setting, the medical direction or authorization shall be provided, as appropriate, through the physician's order, standing medical order, or standing delegation order of a referring physician, in accordance with Occupations Code, Chapter 157, Subchapter A, and rules adopted by the Board of Medical Examiners implementing the subchapter.

(3) A licensed dietitian, acting within the scope of his or her license and consistent with medical direction or authorization as provided in this section, may order medical laboratory tests relating to the implementation or provision of medical nutrition therapy and related medical protocols for individual patients or groups of patients. In a licensed health facility, the medical direction or authorization shall be provided, as appropriate, through a physician's order, or a standing medical order, or standing delegation order, or medical protocol, issued in accordance with Occupations Code, Chapter 157, Subchapter A, and rules adopted by the Board of Medical Examiners implementing the subchapter. In a private practice setting, the medical direction or authorization shall be provided through the physician's order, standing medical order, or a standing delegation order of the referring physician, in accordance with Occupations Code, Chapter 157, Subchapter A, and rules adopted by the Board of Medical Examiners implementing the subchapter.

(d) Code of ethics. These rules shall constitute a code of ethics as authorized by the Act, §701.151.

(1) Professional representation and responsibilities.

(A) A licensee shall conduct himself/herself with honesty, integrity and fairness.

(B) A licensee shall not misrepresent any professional qualifications or credentials. A licensee shall not knowingly or recklessly make any false or misleading claims about the efficacy of any nutrition services or dietary supplements.

(C) A licensee shall not permit the use of his/her name for the purpose of certifying that nutrition services have been rendered unless that licensee has provided or supervised the provision of those services.

(D) A licensee shall not promote or endorse products in a manner that is false or misleading.

(E) A licensee shall disclose to a client, a person supervised by the licensee, or an associate any personal gain or profit from any item, procedure, or service used by the licensee with the client, supervisee, or associate.

(F) A licensee shall maintain knowledge and skills required for professional competence. A licensee shall provide nutrition services based on scientific principles and current information. A licensee shall present substantiated information and interpret controversial information without bias.

(G) A licensee shall not abuse alcohol or drugs in any manner which detrimentally affects the provision of nutrition services.

(H) A licensee shall comply with the provisions of the Texas Controlled Substances Act, the Health and Safety Code, Chapter 481 and Chapter 483 relating to dangerous drugs; and any rules of the department or the Texas State Board of Pharmacy implementing those chapters.

(I) A licensee shall have the responsibility of reporting alleged misrepresentations or violations of board rules to the board's executive secretary.

(J) A licensee shall comply with any order relating to the licensee which is issued by the board.

(K) A licensee shall not aid or abet the practice or misrepresentation of an unlicensed person when that person is required to have a license under the Act.

(L) A licensed dietitian shall supervise a provisional licensed dietitian in accordance with §711.9 of this title (relating to Provisional Licensed Dietitians).

(M) A licensee shall not make any false, misleading, or deceptive claims in any advertisement, announcement, or presentation relating to the services of the licensee, any person supervised by the licensee or any dietary supplement.

(N) A licensee shall conform to generally accepted principles and standards of dietetic practice which are those generally recognized by the profession as appropriate for the situation presented, including those promulgated or interpreted by or under the association or commission, and other professional or governmental bodies. A licensee shall recognize and exercise professional judgement within the limits of his/her qualifications and collaborate with others, seek counsel, or make referrals as appropriate.

(O) A licensee shall not interfere with an investigation or disciplinary proceeding by willful misrepresentation of facts to the board or its authorized representative or by the use of threats or harassment against any person.

(2) Professional relationships.

(A) A licensee shall make known to a prospective client the important aspects of the professional relationship including fees and arrangements for payment which might affect the client's decision to enter into the relationship. A licensee shall bill a client or a third party in the manner agreed to by the licensee and in accordance with state and federal law.

(B) A licensee shall not receive or give a commission or rebate or any other form of remuneration for the referral of clients for professional services.

(C) A licensee shall disclose to clients any interest in commercial enterprises which the licensee promotes for the purpose of personal gain or profit.

(D) A licensee shall take reasonable action to inform a client's physician and any appropriate allied health care provider in cases where a client's nutritional status indicates a change in medical status.

(E) A licensee shall provide nutrition services without discrimination based on race, creed, gender, religion, national origin, or age.

(F) A licensee shall not violate any provision of any federal or state statute relating to confidentiality of client communication and/or records. A licensee shall protect confidential information and make full disclosure about any limitations on his/her ability to guarantee full confidentiality.

(G) A licensee shall not engage in sexual contact with a client. The term "sexual contact" means any type of sexual behavior described in the Texas Penal Code, Chapters 21, 22, or 43, and includes sexual intercourse. A licensee shall not engage in sexual harassment in connection with professional practice.

(H) A licensee shall terminate a professional relationship when it is reasonably clear that the client is not benefiting from the services provided.

(I) A licensee shall not provide services to a client or the public if by reason of any mental or physical condition of the licensee, the services cannot be provided with reasonable skill or safety to the client or the public.

(J) A licensee shall not provide any services which result in mental or physical injury to a client or which create an unreasonable risk that the client may be mentally or physically harmed.

(K) A licensee shall provide sufficient information to enable clients and others to make their own informed decision.

(L) A licensee shall be alert to situations that might cause a conflict of interest or have the appearance of a conflict. A licensee shall make full disclosure when a real or potential conflict of interest arises.

(3) Supervision of provisional licensed dietitian. A licensed dietitian shall adequately supervise a provisional licensed dietitian or a temporary licensed dietitian for whom the licensee has assumed supervisory responsibility.

(4) Billing information required; prohibited practices.

(A) On the written request of a client, a client's guardian, or a client's parent, if the client is a minor, a licensee shall provide, in plain language, a written explanation of the charges for client nutrition services previously made on a bill or statement for the client. This requirement applies even if the charges are to be paid by a third party.

(B) A licensee may not persistently or flagrantly overcharge or overtreat a client.

(5) Sanctions. A licensee shall be subject to disciplinary action by the board if under the Crime Victims Compensation Act, Texas Code of Criminal Procedure, Article 56.31, the licensee is issued a public letter of reprimand, is assessed a civil penalty by a court, or has been convicted and ordered to pay court costs under the Crime Victims Compensation Act, Texas Code of Criminal Procedure, Chapter 56, Subchapter B, Article 56.55.

(e) Disclosure.

(1) A licensee shall make a reasonable attempt to notify each client of the name, mailing address, and telephone number of the board for the purpose of directing complaints to the board by providing notification:

(A) on each written contract for services of a licensee;

(B) on a sign prominently displayed in the primary place of business of each licensee; or

(C) in a bill for service provided by a licensee to a client or third party.

(2) A provisional licensed dietitian must include the name and telephone number of his or her supervisor in all advertising and announcements of services including business cards and applications for employment.

(f) Unlawful, false, misleading, or deceptive advertising.

(1) A licensee shall use factual information to inform the public and colleagues of his/her services. A licensee shall not use advertising that is false, misleading, or deceptive or that is not readily subject to verification.

(2) False, misleading, or deceptive advertising or advertising that is not readily subject to verification includes advertising that:

(A) makes a material misrepresentation of fact or omits a fact necessary to make the statement as a whole not materially misleading;

(B) makes a representation likely to create an unjustified expectation about the results of a health care service or procedure;

(C) compares a health care professional's services with another health care professional's services unless the comparison can be factually substantiated;

(D) contains a testimonial;

(E) causes confusion or misunderstanding as to the credentials, education, or licensure of a health care professional;

(F) advertises or represents that health care insurance deductibles or copayments may be waived or are not applicable to health care services to be provided if the deductibles or copayments are required;

(G) advertises or represents that the benefits of a health benefit plan will be accepted as full payment when deductibles or copayments are required;

(H) makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of patient; or

(I) advertises or represents in the use of a professional name a title or professional identification that is expressly or commonly reserved to or used by another profession or professional.

(3) A "health care professional" includes a licensed dietitian, provisional licensed dietitian, temporary licensed dietitian, or any other person licensed, certified, or registered by the state in a health-related profession.

(g) Applicants. A violation of any provision of subsection (d) of this section by a person who is an applicant or who subsequently applies for a license (even though the person was not a licensee at the time of the violation) may be a basis for disapproval of the application under §711.8(e)(7) of this title (relating to Determination of Eligibility).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 3, 2006.

TRD-200603581
Ralph McGahagin
Chair
Texas State Board of Examiners of Dietitians
Effective date: July 23, 2006
Proposal publication date: January 13, 2006
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 96. BLOODBORNE PATHOGEN CONTROL

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), adopts amendments to §§96.101, 96.201 - 96.203, 96.301 - 96.304, 96.401, 96.402, 96.501 and the repeal of 96.601, concerning the applicability, minimum standards, safety recommendations, device registration procedures and fees, and sharps injury logs of bloodborne pathogen exposure control plans. The amendments to §§96.301, 96.401, and 96.501 are adopted with changes to the proposed text as published in the January 6, 2006, issue of the *Texas Register* (31 TexReg 79). Sections 96.101, 96.201 - 96.203, 96.302 - 96.304, 96.402, and the repeal of 96.601 are adopted without changes, and the sections will not be republished.

BACKGROUND AND PURPOSE

The amendments and repeal are necessary to comply with Health and Safety Code, §§81.301 - 81.307, which require the department to establish an exposure control plan designed to minimize exposure of employees to bloodborne pathogens and to implement a registration program for needleless systems and sharps with engineered sharp injury protections; and House Bill 2292, 78th Legislature, Regular Session, 2003, §2.42, added Health and Safety Code, §12.0112, which requires that the term for licenses issued or renewed after January 1, 2005, will be two years.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 96.101, 96.201 - 96.203, 96.301 - 96.304, 96.401, 96.402, 96.501, and 96.601 have been reviewed, and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed and required by law. Section 96.601 is repealed because the rule is no longer necessary.

SECTION-BY-SECTION SUMMARY

Amendments to §96.101 add more components to the definitions of "Governmental unit" and also provide additional information concerning the contracting of the Hepatitis B, C, and Human immunodeficiency viruses; §§96.201 - 96.203, 96.301 - 96.304, 96.401, 96.402, and 96.501 update and correct the department's reference from the "Texas Department of Health" to the "Department of State Health Services"; §§96.202, 96.303, and 96.401 provide a new website for information on bloodborne pathogen control; amendments to §96.301 and §96.501 reflect changes in the Department of State Health Services' organizational unit names and commissioner titles; amendments to §96.302 and §96.304 add a two-year period for registration and renewal fees; §96.301 and §96.501 are amended to delete reference to issuance of waivers.

Section 96.601 is repealed because the reference to the effective date of the rules is no longer relevant.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepts. The commenter was an individual representing the Texas AIDS Network. The commenter was not against the rules in their entirety; however, the commenter asked about the continuation of rules that had an expiration date.

Comment: Concerning Safety Recommendation Waiver for Undue Burden in §96.301(b), the commenter asked why the May 1,

2003, prohibition date was extended for the use of prefilled syringes approved by the Federal Food and Drug Administration.

Response: The commission agrees that the waiver for prohibition of the use of the prefilled syringe approved by the Federal Food and Drug Administration shall be continued because certain medications including immunization vaccines and antibiotics are available only in a prefilled syringe. There was no change made as a result of this comment.

Comment: Concerning Waiver for Rural Counties in §96.501, the commenter asked why the 2001 date for the waivers for rural counties was extended.

Response: The commission agrees that waivers should no longer be granted and this section has been amended to reflect this in the final version of the rules. The legislation that authorized the granting of waivers has expired (Chapter 1411, 76th Legislature §26.02).

The department staff, on behalf of the commission, provided comments and the commission has reviewed and agrees to the following changes.

Change: Concerning §96.301(b), Waiver for Undue Burden, staff noted that the legislature provision which allowed this waiver expired in 2001 and this section has been amended to reflect the changes. The legislation that authorized the granting of waivers has expired (Chapter 1411, 76th Legislature, §26.02).

Change: Concerning §96.401(f), the Internet address was corrected to "http://www.dshs.state.tx.us/idcu/health/bloodborne_pathogens/reporting/" instead of "http://www.dshs.state.tx.us/ideas/bloodborne_pathogens/reporting/".

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Cathy Campbell, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

25 TAC §§96.101, 96.201 - 96.203, 96.301 - 96.304, 96.401, 96.402, 96.501

STATUTORY AUTHORITY

The adopted amendments are authorized by Health and Safety Code, Subchapter H, Bloodborne Pathogen Exposure Control Plan, §§81.301 - 81.307. Specifically, §§81.303 - 81.304 requires the department by rule to establish and implement an exposure control plan designed to minimize exposure of employees to bloodborne pathogens; §81.305 which requires the department to recommend that governmental units implement needleless systems and sharps with engineered sharps injury protection for employees; §81.306 which requires that the department by rule require that information concerning exposure incidents be recorded in a log; and §81.307 which requires that the department by rule implement a registration program for existing needleless systems and sharps with engineered sharp injury protections; Health and Safety Code, §12.0112, which requires that the term for licenses issued or renewed after January 1, 2005, will be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

§96.301. Safety Recommendations.

(a) The Department of State Health Services (department) recommends that governmental units implement needleless systems and sharps with engineered sharps injury protection for employees.

(b) Waivers shall not be granted. The provisions in the legislation which allowed the department to grant waivers, has expired (Chapter 1411, 76th Legislature, §26.02).

(c) The use of a prefilled syringe that is approved by the Federal Food and Drug Administration may not be prohibited.

(d) Evaluation committee.

(1) At least half of the members of an evaluation committee established by a governmental unit to implement subsection (b) of this section must be employees who are health care workers who have direct contact with patients or provide services on a regular basis.

(2) Whenever possible, the governmental entity establishing the evaluation committee shall consider using committees with similar duties already in existence.

§96.401. Sharps Injury Log.

(a) The chief administrative officer for each facility within a governmental unit shall report, as required by this section, each employee, as defined in §96.101(7) of this title (relating to Definitions), who sustains a contaminated sharps injury, as defined in §96.101(5) of this title. The chief administrative officer of the governmental unit may designate an employee for each facility within the governmental unit to serve as the reporting officer.

(b) Information concerning each contaminated sharps injury shall be recorded in a written or electronic sharps injury log which shall be maintained by a governmental unit, in accordance with Health and Safety Code, Chapter 81, Subchapter H, and this chapter.

(c) The following information must be recorded in the sharps injury log:

(1) name and address of facility where injury occurred;

(2) name and phone number of the chief administrative officer or reporting officer;

(3) date and time of the injury;

(4) age and sex of the injured employee;

(5) type and brand of sharp involved;

(6) original intended use of the sharp;

(7) whether the injury occurred before, during, or after the sharp was used for its original intended purpose;

(8) whether the exposure was during or after the sharp was used;

(9) whether the device had engineered sharps injury protection, as defined in §96.101(9)(A) and (B) of this title (relating to Definitions), and if yes, was the protective mechanism activated and did the exposure incident occur before, during, or after activation of the protective mechanism;

(10) whether the injured person was wearing gloves at the time of the injury;

(11) whether the injured person had completed a hepatitis B vaccination series;

(12) whether a sharps container was readily available for disposal of the sharp;

(13) whether the injured person received training on the exposure control plan during the 12 months prior to the incident;

(14) the involved body part;

(15) the job classification of the injured person;

(16) the employment status of the injured person;

(17) the location/facility/agency and the work area where the sharps injury occurred; and

(18) a listing of the implemented needleless systems and sharps with engineered sharps injury protection for employees available within the governmental entity.

(d) Information contained in subsection (c)(1) - (17) of this section concerning each contaminated sharps injury shall be reported not later than ten working days after the end of the calendar month in which it occurred.

(e) A chief administrative officer for each facility within a governmental unit or the designee shall report the contaminated sharps injury to the local health authority where the facility is located. The local health authority, acting as an agent for the Department of State Health Services (department), shall receive and review the report for completeness, and submit the report to the department. If no local health authority is appointed for the jurisdiction where the facility is located, the report shall be made to the regional director of the Department of State Health Services (department) regional office in which the facility is located.

(f) A contaminated sharps injury shall be reported on the department's Contaminated Sharps Injury Reporting Form or through an electronic means established by the department. Copies of the Contaminated Sharps Injury Reporting Form can be obtained on the Internet at http://www.dshs.state.tx.us/idcu/health/bloodborne_pathogens/reporting/ or from the Department of State Health Services regional offices.

§96.501. Waiver for Rural Counties.

Waivers shall not be granted. The provisions in the legislation which allowed the department to grant waivers, has expired (Chapter 1411, 76th Legislature, §26.02).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 3, 2006.

TRD-200603586
Cathy Campbell
General Counsel
Department of State Health Services
Effective date: July 23, 2006
Proposal publication date: January 6, 2006
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

25 TAC §96.601

STATUTORY AUTHORITY

The adopted repeal is authorized by Health and Safety Code, Subchapter H, Bloodborne Pathogen Exposure Control Plan, §§81.301 - 81.307. Specifically, §§81.303 - 81.304 requires the department by rule to establish and implement an exposure control plan designed to minimize exposure of employees to bloodborne pathogens; §81.305 which requires the department to recommend that governmental units implement needleless systems and sharps with engineered sharps injury protection for employees; §81.306 which requires that the department by rule require that information concerning exposure incidents be recorded in a log; and §81.307 which requires that the department by rule implement a registration program for existing needleless systems and sharps with engineered sharp injury protections; Health and Safety Code, §12.0112, which requires that the term for licenses issued or renewed after January 1, 2005, will be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 3, 2006.

TRD-200603587
Cathy Campbell
General Counsel
Department of State Health Services
Effective date: July 23, 2006
Proposal publication date: January 6, 2006
For further information, please call: 458-7111 x6972

♦ ♦ ♦

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES

SUBCHAPTER FF. OBLIGATION TO CONTINUE PREMIUM PAYMENT AND COVERAGE AFTER NOTICE OF LOST GROUP ELIGIBILITY

28 TAC §§21.4001 - 21.4003

The Commissioner of Insurance adopts new Subchapter FF, §§21.4001 - 21.4003, concerning the obligation of certain group health coverage policyholders and contract holders to continue premium payment, and a carrier's corresponding obligation to continue coverage, after notice of an individual's lost group eligibility. The sections are adopted with changes to the proposed text as published in the February 10, 2006, issue of the *Texas Register* (31 TexReg 793).

These new sections are necessary to implement §1 and §2 of Senate Bill 51, enacted by the 79th Legislature, Regular Session, which added Insurance Code §843.210 and §1301.0061, effective September 1, 2005. Section 843.210 and §1301.0061 apply, respectively, to group health maintenance organization contracts and group preferred provider benefit plan policies entered into or renewed on or after January 1, 2006. Subsequent

to the enrollment of Senate Bill 51, the Department received requests for formal guidance and procedures necessary to implement this new legislation uniformly. In response, the Department proposed new §§21.4001 - 21.4003. These new sections outline the scope of a group policyholder's or contract holder's liability for premium payment; define relevant terms; and detail means of complying with the statute, including providing notice of late-month terminations and situations involving duplicative or unnecessary coverage. The Department posted an informal draft of the new sections relating to the obligation to continue premium payment and coverage after notice of lost group eligibility on January 12, 2006 and invited public input. Following publication of the proposed new sections in the *Texas Register* on February 10, 2006, the Department held a public hearing on February 21, 2006, and received comments regarding suggested changes to the proposed sections. In response to comments made at the hearing and written comments from interested parties, the Department is adopting these new sections with some changes to the proposal as published. None of these changes introduce new subject matter or affect persons other than those subject to the proposal as originally published. Throughout the adopted rule, the Department has made editorial and grammatical changes to the rule as proposed for ease of reading and clarity and, where necessary, corrected punctuation, references, and typographical errors.

The adopted sections should be read in conjunction with Senate Bill 51, §1 and §2, the Insurance Code, and other statutes and rules as applicable. Additionally, in the section of this adoption entitled Summary of Comments and Agency's Response to Comments, the Department has included some examples to clarify the applicability of certain rule subsections.

§21.4001. A commenter requested clarification regarding the specific situations to which this section's last sentence applies to differentiate between events that do and do not trigger the premium payment and coverage requirements. Another commenter stated that the last sentence of this section appears to make the statute inapplicable when an entire group terminates and a person remains eligible but voluntarily elects to terminate coverage and the commenter requested examples for clarification. The last sentence of this section applies to a person who remains part of the group eligible for coverage. The Department disagrees with one commenter's request to provide examples in this section. The Department, however, agrees that revising the last sentence of this section is necessary to clarify that the provision applies to a person who remains part of the group eligible for coverage. This clarification should make explanatory examples for this section unnecessary. Therefore, the Department has amended this sentence to replace the phrase "without leaving the group eligible for coverage" with the phrase "while remaining part of the group eligible for coverage," to provide the requested clarification.

§21.4002. A commenter noted that the definition of "health insurer" in proposed paragraph (4) included a reference to Insurance Code Chapter 941, which governs Lloyd's plans and reciprocal and inter-insurance exchanges, which are not subject to Chapter 1301. The Department has revised the definition to delete the reference to Chapter 941. In proposed paragraph (5), in the definition of "health maintenance organization," the Department has added the phrase "as defined in Insurance Code §843.002(14)" for clarification of its statutory derivation and consistency with the definition of "health insurer," which also references its statutory derivation. Several commenters requested a revision to the first sentence in the definition of the term "month." Parties representing the interests of health care providers, insurance carriers, employers, and insurance agents formed an informal workgroup (subsequently referred to as the workgroup) to review the proposal and to suggest language for clarification. One of the changes this workgroup suggested was to the definition of "month" in proposed §21.4002(6). According to the workgroup, "there are instances where a month is not necessarily a calendar month and may be defined as greater than 30 days." Accordingly, the workgroup suggested adding the phrase "as provided in the group policy or contract" at the end of the first sentence of the definition of "month" for clarification that the meaning of "month" is specified by language contained within the group policy or contract. A second commenter suggested adding the words "applicable to the policy and as agreed upon by the health carrier and the policyholder or contract holder" after "succeeding calendar month." Another commenter requested making explicit in the Department's introductory explanation that the definition of "month" be set by agreement of both the health carrier and the policyholder or contract holder, and that the same agreed-upon definition of the term "month" should apply with respect to the policy for all enrollees and insureds, rather than applying a different definition with respect to each enrollee or individual insured. The suggestion to add the language "as provided in the group policy or contract" is consistent with the Department's interpretation of the statute, and the Department has revised paragraph (6) accordingly. The Department disagrees with the second recommended change because it is unnecessary; agreement between the carrier and the policyholder or contract holder is included in the concept of the group policy or contract.

§21.4003. In proposed subsection (b), a commenter asked that the word "accepts" be replaced by the word "receives" for clarification and to prevent providers and patients from potential responsibility for payments. Because the term "receives" would imply that the carrier must accept notice by mail, in response to this comment the Department has deleted the word "accepts" in adopted subsection (b) and has replaced it with the phrase "agrees that a group policyholder or group contract holder may tender." This new language clarifies compliance to facilitate notification and to prevent situations in which providers, insureds, or enrollees become responsible for payments. Also in subsection (b) of this section as adopted, the Department added an optional provision that states that evidence of written notifications may be maintained in a mail log in order to provide proof of submission and establish date of receipt. This added provision is modeled on language, in 28 TAC §21.2816(h) (relating to Date of Receipt) of Subchapter T, Submission of Clean Claims Rules.

The additional notification period contained in proposed subsection (c) elicited many comments. A commenter suggested that the Department change the additional notification period from five days to the "tenth calendar day of the next policy or contract month" because businesses notify their carriers of terminations at the same time they pay their monthly premiums and their plan receives payment and termination notification by the tenth calendar day of the next contract or policy month. One commenter stated that anything less than five days was not a reasonable amount of time for an additional notification period. Another commenter completely opposed the additional notification period because an individual may obtain costly services during that time period and carriers may retroactively deny these claims upon learning an employee is no longer part of the group eligible for coverage. The workgroup also agreed upon and suggested language to clarify this subsection as proposed. The workgroup supported the implementation of an additional noti-

fication period, as long as it was narrowly drafted to avoid diminishing the impact of Senate Bill 51, and suggested a change to the proposed language incorporating a three-day additional notification period. The Department agrees with the commenters who asserted that it is important to reflect the necessarily strict notification standard of the statute to encourage timely notification. Based upon commenters' input and a need to reflect the intent of the statute, the Department has revised the language in subsection (c) of §21.4003 to modify the additional notification period from five days as proposed to three days. The three-day additional notification period provides a reasonable time for employers to deal with end-of-month terminations. This change is necessary to balance various stakeholders' interests, while still providing policyholders and group contract holders needed flexibility to notify health carriers of late-month terminations. The Department effected this change by replacing the entire first sentence in proposed subsection (c) with a new provision stating that if the eligibility at issue ends within seven calendar days prior to the end of the month, the group policyholder or contract holder will be deemed to have notified the carrier that same month, if the health carrier receives notification within the first three days, excluding Saturdays, Sundays, and legal holidays, of the subsequent month. In the second sentence of subsection (c) the same commenters recommended inserting the words "if the notification is sent during" in place of the word "during" and inserting "three-day" before the words "notification period."

A commenter requested that proposed subsection (c) clarify the date that electronic transmissions are sent is the date such transmissions might be opened (e.g., in an e-mail) or otherwise processed by the health carrier. The Department agrees with the commenter and has added language to subsection (c)(2) of this section to clarify that immediate written notification sent via electronic means will be presumed received on the date it is submitted. This new language is modeled on the "date of receipt" language in 28 TAC §21.2816(b)(2) and (d). Consistent with this change, the Department has also made another modification in this subsection for clarification and to facilitate compliance with the rules and the statutes. The Department has added language in subsection (c)(2) to state that, hand-delivered notifications will be presumed received on the date the delivery receipt is signed.

A few commenters stated that while it was clear that the intent of proposed §21.4003(c), (d), (e), (g), and (h) was to create certain exemptions to the Senate Bill 51 requirements as restated in subsection (a) of this section, the effect is that the rule as proposed exempts parties from including provisions in their contracts rather than exempting the parties from the effect of those provisions. These commenters requested that the lead-in sentence to these proposed subsections be revised. The Department has completely revised the first sentence of subsection (c) in response to another comment; thus the commenter's request to change the lead-in sentence language in subsection (c) is moot. The Department otherwise agrees with the commenters and has therefore revised the language in the lead-in sentence in subsections (d), (e), (f), (g), and (h) as adopted to delete the phrase "subsection (a) of this section does not apply," and substitute new language that states "[a] group policyholder or group contract holder is not liable for an individual insured's or an enrollee's premiums under subsection (a) of this section if . . . ."

In conjunction with the change to the lead-in sentence language of subsections (d) - (h), the Department has also added the phrase "and a health carrier is not obligated to continue coverage" to clarify that since group policyholders and contract holders will not be required to pay premium, health carriers will not be required to continue coverage under subsection (a) if one or more of subsections (d) - (h) are applicable. While this is implied in the proposed subsections, it is not explicit except in proposed subsection (e). In subsection (e), the Department has also deleted the proposed language "and may terminate an individual insured's or enrollee's coverage under a group health benefit plan at the time the individual is no longer a part of the group eligible for coverage under the plan." This language is no longer necessary because it is redundant of the added language "and a health carrier is not obligated to continue coverage."

The Department has revised the title of §21.4003 from "Group Policyholder Liability for Premiums" to "Group Policyholder, Group Contract Holder, and Carrier Premium Payment and Coverage Obligations" to express more completely and accurately the scope of the section.

A commenter stated that proposed §21.4003(e) was unduly burdensome to an employer who may be unable to meet a carrier's proof requirements and suggested a language change to allow an employer policyholder or contract holder to submit a certification that the individual has obtained new coverage and suggested substituting the phrase "reasonable representation to the health carrier that the individual will have new coverage" for the phrase "proof of the new coverage." While the Department does not find a meaningful substantive difference between the proposed standard and the commenter's suggestion, the Department agrees to substitute the word "verify" for the phrase "provide proof of" to address the commenter's concerns that the provision would be unduly burdensome to employers. Also, in proposed §21.4003(e), a commenter recommended a new paragraph to clarify that the section does not apply to coverage a health carrier extends to an individual "that is immediately followed by continuation coverage elected by or on behalf of an individual insured or enrollee." The Department disagrees that this change is necessary because subsection (e) of the rule allows an employer to end its premium payment obligation under Senate Bill 51 when its ex-employee obtains successor coverage, including continuation coverage. The Department, however, has changed the term "new" to "successor" in subsection (e) to clarify this situation. Also, in subsection (e) as adopted, the Department has substituted the phrase "immediately upon termination of coverage under a group health benefit plan" with the phrase "at any time after termination of group eligibility and before the end of the coverage and premium payment period required by Insurance Code §843.210 and §1301.0061 and subsection (a) of this section" because it is necessary to end the obligation to continue premium payment requirements from the time successor coverage begins whether or not it is immediately upon termination of coverage under the group health benefit plan.

Section 21.4001 explains the purpose and scope of the subchapter, clarifying that the subchapter does not impose requirements on a group policyholder, a group contract holder, or a health carrier when an entire group ends coverage under a health benefit plan or when an individual terminates coverage while remaining part of the group eligible for coverage. Section 21.4002 contains definitions relevant to this subchapter; of particular significance is the definition of the term "month," which is defined in a manner that allows the parties to provide by contract the start and end of the monthly period.

Section 21.4003 addresses group policyholder and contract holder liability for the obligation to continue premium payment and coverage requirements after notice of an individual's lost group eligibility. Subsection (a) restates the requirements

that Senate Bill 51 imposes on a health carrier and a group policyholder or group contract holder under a health benefit plan contract. This subsection outlines the requisite contract language. Section 21.4003(b) defines a receipt date for notice tendered by mail. This subsection codifies the "mailbox rule," which is the legal principle that a communication regarding a contract, such as notification of employee termination, is deemed received when tendered as authorized to the U.S. Postal Service. Further, subsection (b) provides that evidence of written notifications may be maintained in a mail log in order to provide proof of submission and establish date of receipt.

Section 21.4003(c) provides that if an individual or an enrollee ceases to be a part of the group eligible for coverage within seven calendar days prior to the end of the month, then the group policyholder or contract holder will be deemed to have notified the health carrier in that same month as long as the carrier receives notification within the first three days of the subsequent month, not including Saturdays, Sundays, and legal holidays. Paragraphs (1) and (2) of subsection (c) further direct that the group policyholder or group contract holder must agree with the health carrier upon a method to transmit the notification under subsection (c), which must provide for immediate written notification, such as an internet portal, electronic mail, or telefacsimile. Subsection (c)(2) also provides that if such notification is sent via electronic means, then it will be presumed received on the date that it is submitted, and that if such notification is hand-delivered, then it will be presumed received on the date the delivery receipt is signed.

Section 21.4003(d) recognizes that in some instances a group policyholder or group contract holder will be able to notify a health carrier that an individual will no longer be part of the group eligible for coverage prior to the date the individual actually leaves the group. Accordingly, this subsection allows for termination of premium payment and coverage on the date the individual leaves the group if the employer provides at least 30 days prior notice.

Section 21.4003(e) clarifies that a group policyholder or group contract holder and a health carrier may eliminate their premium payment and coverage responsibilities if the individual no longer a part of the group eligible for coverage under the plan elects to terminate coverage and obtains coverage under a successor health benefit plan that takes effect after termination of group eligibility and before the end of the coverage and premium payment period required by §21.4003(a) and Insurance Code §843.210 and §1301.0061. This subsection authorizes a health carrier to require a group policyholder or group contract holder seeking to avoid payment of additional premium for an individual to verify the successor coverage and to agree to be responsible for payment of premium if the individual's successor health benefit plan does not cover the individual for the entire period for which the health carrier and the group policyholder or group contract holder are responsible for premium payment and coverage. This subsection also clarifies that the group policyholder or group contract holder and the health carrier remain responsible for premium payment and coverage should the individual's successor plan fail to provide coverage during the period for which the rule otherwise obligates them to continue premium payment and coverage.

Section 21.4003(f) clarifies that the obligations to pay premium and to provide coverage under subsection (a) do not apply to certain continuation coverage.

Section 21.4003(g) clarifies that the obligations to pay premium and to provide coverage under subsection (a) do not apply to health benefit plans under which the group policyholder or group contract holder does not make any contribution to the payment of premium for individuals covered under the plan.

Section 21.4003(h) clarifies that the obligation to pay premium and to provide coverage under subsection (a) ends upon an individual's demise.

SUMMARY OF COMMENTS AND AGENCY'S RESPONSE TO COMMENTS

General: A commenter raises concerns about the applicability of the proposal to a limited benefits company for part-time employees and the possibility that it may reduce participation in health plans for such companies, which address the problem of the uninsured in Texas.

Agency Response: The Department agrees that finding affordable coverage alternatives for the uninsured in Texas is a vital concern. Section 21.4003(g) clarifies that such plans are not subject to the premium payment and coverage requirements of Senate Bill 51 if the group policyholder or contract holder does not contribute any premium for any covered individual. Senate Bill 51 does not distinguish part-time employees from other covered individuals, however.

General: A commenter asks about the application of Senate Bill 51 and these rules with 28 TAC §3.3508(b)(4), (5), and (6) (relating to Rules for Coordination of Benefits and Order of Benefits) for determining the primary plan in different scenarios in which an employee has a window of overlapping coverage because the employee started a new job with immediate coverage and the former employer waited until the next month to notify the carrier. In particular, the commenter wants to know whether the Senate Bill 51 coverage period counts for determining the length of time a person is covered under a plan.

Agency Response: Section 3.3508(b)(6) provides that the plan that covers an employee member or subscriber longer is the primary plan. If both the old and new plans include a coordination of benefits provision, then the old plan is the primary plan during any overlap of coverage. If one of the two plans does not include a coordination of benefits provision, then the plan that does not include the coordination of benefits provision is the primary plan during any overlap of coverage. Extension of coverage under Senate Bill 51 is no different than any other coverage status; therefore, it also extends the length of time a person is covered.

§21.4001: A commenter requests clarification as to the specific situations to which the last sentence in this subsection applies, such as: (1) an employee leaving the eligible class (e.g., end of employment); (2) a dependent becoming ineligible due to age; (3) a dependent spouse becoming ineligible due to divorce; or (4) an employee moving to part-time status. The commenter questions whether the rule applies to coverage terminations such as mid-year election out of coverage due to certain major life events including marriage, birth, and change in residence. Carriers are concerned with differentiating between events that do and do not trigger the requirement given that most employers do not notify them of the specific reasons why an employee is being terminated.

Agency Response: A carrier should comply with the coverage requirements of Senate Bill 51 absent the existence of a rule-based exception excusing performance (e.g., death of an employee). Generally, a group policyholder or group contract holder

will need to notify the carrier of the exceptional circumstances, and the premium payment requirements of Senate Bill 51 will motivate those parties to communicate this information to carriers, where relevant to premium payment obligations. Absent such notification, a carrier should not have to be concerned with differentiating between termination events. The last sentence of §21.4001 applies to a person who remains part of the group eligible for coverage. Accordingly, the Department has amended this sentence to replace the phrase "without leaving the group eligible for coverage" with the phrase "while remaining part of the group eligible for coverage." With regard to the specific situations about which the commenter inquires, the rule contains two basic qualifications that provide the key to interpretation. An individual must be: (1) a member of the group, and (2) eligible for coverage. An employee leaving the eligible class (e.g., end of employment) is no longer part of the group eligible for coverage and thus the sentence would not apply to the employee's situation. A dependent becoming ineligible due to age is no longer part of the group eligible for coverage because the dependent, while still linked to the group through the dependent's relationship to the primary group member, is no longer eligible for coverage; the same is true of a dependent spouse becoming ineligible due to divorce or an employee moving to part-time status. Accordingly, the sentence would not affect the applicability of Senate Bill 51 to each of them. The rule would not require coverage of a person making a mid-year election out of coverage due to certain major life events (e.g., marriage) as long as the person remained part of the group eligible for coverage. If the person obtains successor coverage through, for example, a new spouse's employer, then the person would lose eligibility at the effective date of the new coverage, as provided in the Insurance Code §1501.002(3). Under subsection (e) of §21.4003, the successor coverage would enable the parties to end coverage and premium payment obligations.

§21.4001: A commenter states that the last sentence of this subsection appears to make the statute inapplicable when the entire group terminates, as well as when a person remains eligible but voluntarily elects to terminate coverage. The commenter requests examples clarifying the status of: (1) an employee covered under an employer plan who chooses to drop such coverage for coverage under their spouse's employer's plan; and (2) an employee's husband who has coverage under his wife's employer's plan, but who is dropped from the plan during open enrollment because he has coverage under his own employer's plan.

Agency Response: While the Department does not agree that it is necessary to add the suggested examples to the rule text, the Department will discuss the suggested examples in this response to enhance compliance as entities conform their practices to the adopted regulation.

Example One: A is an employee of XYZ Company (XYZ Co.) and is covered by XYZ's carrier's health plan (XYZ carrier). During A's spouse's employer's open enrollment period, A chooses to drop coverage under the XYZ carrier plan for coverage under A's spouse's plan. Since A is simply declining coverage and not leaving the group eligible for coverage, the rule clarifies that the statutory requirements for premium payment and coverage do not apply to A.

Example Two: B is A's spouse and is covered under A's employer's plan. During open enrollment, however, A, B's wife, decides to drop B from coverage because B obtains coverage under his employer's separate plan. Since A is simply declining coverage and not leaving the group eligible for coverage, the rule clarifies that the statutory requirements for premium payment and coverage do not apply to A.

§21.4001: Another commenter requests specific exemption language for an entire subgroup ending plan coverage due to a professional employer organization's contract termination or when a business transaction such as a merger involves the group policyholder or group contract holder.

Agency Response: The Department disagrees that incorporating specific exemption language into this section is necessary. Section 21.4003(e) addresses the situation in which the group policyholder or contract holder ends premium payment obligations when the subgroup has obtained new coverage.

§21.4001: Some commenters request clarification of the extra-territorial application of the rules. A commenter requests clarification that the statute and proposed rules apply only to Texas residents covered by a Texas-filed policy and suggests changing the first sentence of this section by adding the words "in Texas" after the words "coverage issued." In the second sentence, the commenter requests that the words "who is a resident of Texas" be added after the words "an individual insured or enrollee." Another commenter states that some plan contracts may have provisions limiting their applicability to Texas employees and that extra-territorial jurisdiction could have unintended consequences when other states may address the issue differently. Another commenter opposes limiting the rule to Texas policies because Insurance Code Article 21.42 extends Texas law to all policies payable in the state and Senate Bill 51 regulates policy contracts and applies to all Texans, including those employed by a multi-state entity and covered by a policy entered into and paid for in another state.

Agency Response: The Department disagrees that these changes are necessary to clarify the application of the rule. Moreover, Senate Bill 51 would not authorize the suggested changes. Insurance Code Article 21.42 requires that Texas insurance laws govern contracts of insurance payable to citizens or inhabitants of Texas to provide to those individuals the benefits of those laws. Because Article 21.42 applies Texas law only to citizens or inhabitants of Texas, it would not affect the applicability of Senate Bill 51 and these rules to an out-of-state individual covered through a Texas group policyholder or contract holder. Additionally, if an individual elects to continue coverage under state or federal law, subsection (e) of §21.4003 allows a group policyholder or group contract holder to limit responsibility for premium payment if it begins the continuation period as of the time the individual is no longer part of the group eligible for coverage.

§21.4001 and §21.4003(a)(1): A commenter requests that the provision relating to the termination of coverage by an entire group or to the termination of coverage by an individual while remaining part of the group eligible for coverage be amended by adding the words "to enroll" after "group eligible" in the last sentence of §21.4001 and in §21.4003(a)(1), to avoid the interpretation that "group eligible for coverage" means the group comprised of employees or individuals who are permitted to enroll and who are actually enrolled.

Agency Response: The Department disagrees that the recommended change is necessary for clarification, because the persons enrolled in a plan and the persons eligible to enroll in the same plan are two distinct groups, although their membership will overlap and may be identical.

§21.4002(1): A commenter requests a cross reference to the term "blended contract" in §21.4002(1).

Agency Response: The Department disagrees that such a cross reference is necessary. It is not feasible to cross reference every term used in these rules, which implement Insurance Code §843.210 and §1301.0061. The adopted sections should be read in conjunction with Senate Bill 51, §1 and §2, the Insurance Code, and other statutes and rules as applicable. The definition of "evidence of coverage" is consistent with the definition of the same term in the Insurance Code §843.002(9), and the term "blended contract" is defined at §843.002(3).

§21.4002(4): A commenter notes that the definition of "health insurer" includes a reference to Insurance Code Chapter 941, which governs Lloyd's plans and reciprocal and inter-insurance exchanges, which are not subject to Chapter 1301.

Agency Response: The Department has revised the definition to delete the reference to Chapter 941.

§21.4002(6): Several commenters request revising the first sentence in the definition of the term "month" by adding the words "as provided in the group policy or contract" after "succeeding calendar month," to reference the group policy or contract. Another commenter suggests adding the words "applicable to the policy and as agreed upon by the health carrier and the policyholder or contract holder" after "succeeding calendar month."

Agency Response: The suggestion to add the language "as provided in the group policy or contract" is consistent with the Department's interpretation of the statute, and the Department has revised the rule accordingly. The Department disagrees with the second recommended change because it is unnecessary; agreement between the carrier and the policyholder or contract holder is included in the concept of the group policy or contract.

§21.4002(6): A commenter requests clarification on how the definition of the term "month" would be implemented, particularly where an individual's coverage takes effect after a waiting period. The commenter is unsure how Senate Bill 51 would apply to this employee's termination of coverage.

Agency Response: Senate Bill 51 does not affect inception of coverage dates but does affect termination of coverage dates, overriding a contract that previously would have allowed termination of coverage at the same time as termination of group eligibility. The definition of the term "month" as adopted is revised to allow the parties to an insurance contract to agree to a "month" that does not correspond to the calendar month. The parties must set the terms of any such "month" in their contract, and these terms will govern termination dates for all individuals covered under the contract. Accordingly, the date when a particular covered individual begins coverage is irrelevant to the termination of coverage and premium payment obligations under Senate Bill 51.

§21.4003: A commenter requests a change to exempt from the coverage requirements loss of coverage by non-employee members receiving coverage under an association health plan. The commenter states that the legislative history of Senate Bill 51 indicates that it is intended to apply only to employer-sponsored plans.

Agency Response: The Department disagrees that this change is necessary. While the legislative history of Senate Bill 51 does emphasize issues with employer-sponsored coverage, the legislature chose to enact a bill with broader applicability. Subsection (g) of §21.4003 clarifies that the requirements of the statute do not apply to plans for which policyholders or contract holders do not contribute to the payment of premium, a class that includes many member-only associations.

§21.4003: A commenter requests a change to exempt individually underwritten group arrangements from Senate Bill 51 requirements, contending that such plans are not true group plans because coverage is not made available to association members on a group basis. The commenter asserts instead that members who wish to enroll in the plan must submit applications to the insurance carrier underwriting the plan. The commenter states that in true group employer-sponsored plans, members are entitled to coverage based upon membership in a certain group without regard to medical underwriting.

Agency Response: The Department disagrees that this change is necessary. Subsection (g) of this section clarifies that the requirements of the statute do not apply to plans for which contract holders or policyholders do not contribute any premiums, which includes member-only associations in which the member pays the premium. While enrollment on a group basis without individual medical underwriting is a characteristic of some groups, it is not a bright line test for group coverage. The Department disagrees with the commenter's characterization of member-only associations as not true group plans.

§21.4003(c), (d), (e), (f), (g), and (h): A commenter states that while it is clear that the intent of the proposed rule is to create certain exemptions to the Senate Bill 51 requirements as restated in subsection (a), the effect is that the rule as proposed exempts parties from including provisions in their contracts rather than exempting the parties from their effect. One commenter suggests clarifying the language to indicate that the mandatory provisions in the policy or group contracts must allow for the notice in subsections (c), (d), (e), (g), and (h). Other commenters state that the lead-in sentence language in these subsections as proposed would be more accurate if the phrase "[a] group policyholder or contract holder is not liable for an individual insured's or enrollee's premiums under §21.4003(a) of this section" replaced the phrase "[s]ubsection (a) of this section does not apply," since the contract must contain the statutory language requiring notification but specified situations could except the premium payment and coverage requirements.

Agency Response: The Department agrees with the commenters and has replaced the lead-in sentence language in proposed subsections (d), (e), (g), and (h) to add the phrase "[a] group policyholder or contract holder is not liable for an individual insured's or enrollee's premiums under subsection (a) of this section." In order to make this change consistent in all revised subsections, in subsection (e), the Department deleted the additional language "and may terminate an individual insured's or enrollee's coverage under a group health benefit plan at the time the individual is no longer a part of the group eligible for coverage under the plan," as proposed. Additionally, the first sentence in subsection (c) as adopted and the lead-in sentence to subsection (f) as adopted are also revised for consistency with these requested changes in subsections (d), (e), (g), and (h). In response to another comment, the Department has completely revised the first sentence of subsection (c).

In conjunction with the change to the lead-in sentence language in subsections (d) - (h), the Department has also added the phrase "and a health carrier is not obligated to continue coverage" to clarify that health carriers will not be required to continue coverage under subsection (a) if one or more of subsections (d) - (h) are applicable. While this is implied in the proposed subsec-

tions, it is not explicit except in proposed subsection (e). In subsection (e), the Department has also deleted the proposed language "and may terminate an individual insured's or enrollee's coverage under a health benefit plan at the time the individual is no longer part of the group eligible for coverage under the plan." This language is no longer necessary because it is redundant of the added language "and a health carrier is not obligated to continue coverage."

§21.4003(c): Another commenter requests that in the first sentence of subsection (c) the Department replace the phrase "not subject to" with the phrase "presumed to be in compliance with."

Agency Response: In response to another comment, the Department has completely revised the first sentence of subsection (c); because this subsection no longer contains the phrase "not subject to," the commenter's request for the language change is moot.

§21.4003(a)(1): A commenter recommends deleting the words "or group contract holder" in this paragraph so that the paragraph would read "the group policyholder, as described in Insurance Code Chapter 1251. . . ."

Agency Response: The Department disagrees that this change is necessary because the language is consistent with the Insurance Code Chapter 1251, which contains numerous references to "group policy or contract."

§21.4003(a) - (c): A commenter requests that subsection (c) of this section clarify that electronic transmissions are presumed received the date that electronic transmissions are sent, not the date the health carrier might open or otherwise process such a transmission (e.g., in an e-mail). Except for that clarification, the commenter recommends these subsections remain unchanged as proposed.

Agency Response: The Department agrees with the commenter and has added language to subsection (c)(2) of this section to clarify that immediate written notification sent via electronic means will be presumed received on the date it is submitted. This new second sentence is modeled on the "date of receipt" language, in 28 TAC §21.2816 (relating to Date of Receipt) of Subchapter T, Submission of Clean Claims Rules. Consistent with this change, the Department has also made two other modifications in this subsection for clarification and to facilitate compliance with the rules and the statutes. The Department has added language in subsection (c)(2) to state that, hand-delivered notifications will be presumed received on the date the delivery receipt is signed. The Department has also added an optional provision to subsection (b) of this section that states that a transmitter may maintain evidence of written notifications in a mail log to provide proof of submission and establish date of receipt.

§21.4003(b): A commenter states that this subsection only relates to the issue of coverage and payment of premium, and recommends the Department clarify the subsection by adding language to state that the health carrier cannot be charged with knowledge of a coverage termination until notice of the coverage termination actually arrives.

Agency Response: Timely notification ends the Senate Bill 51 premium payment and coverage obligations at the end of the notification month, even though the carrier may not receive the notification by the end of that month. Obligating the carrier to representations relating to coverage between the end of the month and the receipt of timely-tendered notice of termination would nullify the effect of the additional notification period, as well as the "mailbox rule." Prudent group policyholders and contract holders will provide notice as early as practicable, and when early notification is not possible, will communicate with their carriers by telephone to inform them of the transmission of notice. While this practice is particularly important when the policyholder or contract holder has transmitted notification by mail, it is also a good idea for a group policyholder or contract holder to confirm receipt of an electronically transmitted notice.

§21.4003(b): A commenter requests a change to this subsection to prevent a provider or patient from becoming responsible for payments. The commenter requests that the word "accepts" in the first sentence be replaced by the word "receives."

Agency Response: The Department has revised the rule to address the commenter's concern and to clarify compliance. However, the Department does not agree that the term "receives" is appropriate because it implies that the carrier must accept notice by mail. Therefore, the Department has replaced the term "accepts" with "agrees that a group policyholder or group contract holder may tender."

§21.4003(b) and (c): Another commenter requests a change to these two subsections to prevent a provider or patient from becoming responsible for payments. The commenter suggests language for a second sentence in each subsection to state that if otherwise covered services are provided during the additional notification period, the health carrier shall process and pay additional premium pro-rated through the date the services were provided.

Agency Response: The Department disagrees with the commenter because this change would nullify the effect of timely transmission of notice by mail, as well as compliant transmission of notice during the additional notification period. Most individuals losing eligibility for group coverage have the opportunity to elect to continue that coverage under either federal or state laws, which would allow them to avoid undue financial obligation.

§21.4003(b) and (c): A commenter suggests that the Department change the additional notification period from five days to the "tenth calendar day of the next policy or contract month" because businesses notify their carriers of terminations at the same time they pay their monthly premiums and their plan receives payment and termination notification by the tenth calendar day of the next contract or policy month. Another commenter requests extension of the additional notification period to ten days to accommodate employers such as those with multiple worksites but only one business office processing notices of termination.

Agency Response: The Department disagrees that lengthening the additional notification period from five days to ten days is necessary because it is not consistent with a reasonable interpretation of Senate Bill 51. The intent of Senate Bill 51 is to encourage prompt and timely notification of an individual's loss of group eligibility. For consistency with the intent of Senate Bill 51 and in response to the requests of several stakeholders, the Department has shortened the additional notification period from the proposed five days to three days. The additional notification period of three days as adopted is consistent with the period of time to effect notification by mail, encourages the use of means that provide immediate notification, and balances the interests of the various parties. The Department will, however, monitor the ability of group policyholders and group contract holders to tender timely notice under the adopted rule.

§21.4003(c): A commenter opposes the additional notification period because an individual may obtain costly services during that time period and carriers may retroactively deny these claims upon learning an employee is no longer part of the group eligible for coverage. The commenter states that sometimes retroactive denials occur after the expiration of the individual's continuation election period, negating the ability of the provider to encourage the individual to elect continuation. The commenter questions the need for the additional notification period in an era of instant messaging. Other commenters support the additional notification period. Several commenters recommend that the first sentence of this subsection be replaced with the language: "[i]f an individual or enrollee ceases to be part of the group eligible for coverage within seven calendar days prior to the end of the month, the group policyholder or contract holder will be deemed to have notified the health carrier in the month in which the individual or enrollee ceases to be part of the group if the health carrier receives notification within the first three days of the subsequent month, not including Saturdays, Sundays, and legal holidays." In the second sentence of the subsection, the commenters recommend inserting the words "if the notification is sent during" in place of the word "during" and inserting the words "three-day" before the words "notification period."

Agency Response: The Department understands the commenter's concerns regarding services obtained during the additional notification period; however, due to the fact that notifications may be mailed late in the month, a potential always exists for there to be a short period of time between the termination of employment and notification to a carrier. The Department agrees with and has incorporated the suggested change limiting the additional notification period to three days, as well as limiting the additional period to terminations that occur within seven days before the end of the month. The additional three-day "instantaneous method" notification period tracks the mailing period closely and minimizes the risk to a physician or provider while recognizing that some employers may continue to have problems with providing timely notice of late-month terminations. The Department has also minimized the risk to physicians or providers by limiting the use of the three-day additional notification period to terminations that occur within seven days of the end of a month. Since the additional notification period will always occur within a few days of termination of group membership, the individual will always be within any applicable continuation of coverage election period. While recoupment presents a potential problem, physicians and providers that promptly file claims incurred within the additional notification period should receive a response from the carrier in time to encourage patients to exercise their continuation options. Since the additional notification period is only three days, a carrier's eligibility records should be updated by the time the carrier processes the claim and the physician or provider should get a denial instead of an incorrect payment that may ultimately result in a recoupment request after it is too late for the patient to continue coverage.

§21.4003(c): Another commenter suggests anything less than five days is not a reasonable amount of time for an additional notification period.

Agency Response: The three-day period provides a reasonable time for employers to deal with end-of-month terminations and other extreme circumstances. While there are potentially some group policyholders or contract holders that could not provide notice in three additional days that could in five, the longer the additional notification period, the more likely it will counteract the goal of Senate Bill 51 of encouraging timely notification by group policyholders or contract holders. The rule as adopted balances the interests of all affected parties.

§21.4003(c): A commenter requests a change to provide for the fact that any time the terminated member obtains other coverage, the carrier's obligation to pay for coverage would cease, and so would the plan sponsor's obligation to pay premium.

Agency Response: The Department disagrees with the recommended change because unconditional extinction of the carrier's and the plan sponsor's Senate Bill 51 obligations would violate the intent of the legislation, which is to provide prompt notification. Subsection (e) of the rule allows a terminated member's newly-obtained coverage to extinguish the group policyholder's or contract holder's obligation to continue premium payments, but only upon satisfaction of certain conditions.

§21.4003(d): Commenters propose reducing the prior notice period from 30 days to a period ranging from five business days to two weeks, since employees typically only give two weeks' notice. One commenter notes that carriers use federally-mandated electronic technologies to receive and update eligibility files, to shorten their eligibility processing times, and to give providers accurate notice of an individual's coverage status. Accordingly, the commenter asserts that these technologies eliminate the issues that Senate Bill 51 was designed to address. The commenter recommends substituting the number "five" for "30" and inserting the words "not including a Saturday, Sunday, or legal holiday," before the words "prior to the date."

Agency Response: The Department disagrees with these recommended changes because they are not consistent with a reasonable interpretation of the statute. The statute specifically addresses situations where loss of group eligibility precedes notice (e.g., the individual leaves the group on day one of the month and the group policyholder or contract holder provides notice on day two). In such circumstances, coverage could terminate as late as day 31 of the month. This subsection, however, addresses the reverse situation: when notice precedes loss of group eligibility; the rule's 30-day notice requirement corresponds to the maximum length of coverage under the statute when a group policyholder or group contract holder gives timely notice of termination. The commenter is correct that technical advances mitigate to some extent the issues Senate Bill 51 addresses, and the Department will continue to monitor the implementation of those advances and how they affect the accuracy of group health care coverage enrollment data.

§21.4003(e): A commenter recommends deletion of this provision because it is too complicated and unworkable. The commenter asserts that some employers may not know when an individual is no longer eligible for coverage and that this subsection assumes that the employer knows both when the individual loses eligibility, as well as the existence and effective date of the individual's coverage elsewhere, when such knowledge is unlikely.

Agency Response: The Department understands that this exception will not be practical for all parties in all circumstances, but it is not mandatory. The Department disagrees that this provision should be deleted in its entirety. In response to comments, the Department is adopting this provision to make it available for those able to use it. This provision encompasses options of which employers will likely have knowledge, such as continuation of coverage under COBRA. The Department has revised the subsection as proposed to clarify its application in those situations. The Department has also made other changes to this sub-

section as proposed for purposes of clarification, consistency, and facilitation of compliance: (i) revised the lead-in sentence language to provide that "[a] group policyholder or group contract holder is not liable for an individual insured's or an enrollee's premiums, and a health carrier is not obligated to continue coverage, under subsection (a) of this section and may terminate. . . .."; (ii) changed the term "new" to "successor;" (iii) substituted the term "verify" for the proposed terminology "provide proof of;" and (iv) substituted the phrase "at any time after termination of group eligibility and before the end of the coverage and premium payment period required by Insurance Code §843.210 and §1301.0061 and subsection (a)" for the proposed language "immediately upon termination of coverage under a group health benefit plan" because it is necessary to end requirements from the time successor coverage begins whether or not it is immediately upon termination of coverage under the group health benefit plan.

§21.4003(e): The commenter asserts that this provision is unduly burdensome to an employer who may be unable to meet a carrier's proof requirements and suggests a revision to allow an employer policyholder or contract holder to submit a certification that the individual has obtained new coverage. The commenter suggests specific language that substitutes the phrase "reasonable representation to the health carrier that the individual will have new coverage" for the phrase "proof of the new coverage" to lessen the burden on former employers when a terminating employee may be unwilling or unable to timely obtain and forward the proof of the subsequent coverage.

Agency Response: While the Department does not see a meaningful substantive difference between the existing standard and the one the commenter suggests, the Department has revised subsection (e) to substitute the word "verify" for the proposed language "provide proof of." This change should address the commenter's concerns. Also, regardless of the rule, the Department expects both parties to provide and accept reasonable evidence in satisfaction of the rule standard. A certification should in most cases suffice to verify the new coverage, particularly in light of the obligation to pay premium if the new coverage fails. More direct evidence from an employer--a coverage document from the new plan, an employee's COBRA election--is always preferable, but not always practicable.

§21.4003(f): A commenter asks whether this subsection removes the premium payment requirements imposed by Senate Bill 51 upon employers for those employees who are COBRA participants. The commenter states that COBRA imposes a 30-day grace period and that this subsection has the potential to wreak an undue financial hardship on employers.

Agency Response: An individual's commencement of coverage under a continuation of coverage option ends a group policyholder's or contract holder's obligation to pay premium. The individual remains eligible to continue group coverage for a statutorily-specified period but is no longer part of the group eligible for coverage.

§21.4003(f): A commenter asks when an "eligibility termination event" is a COBRA qualifying event (QE). COBRA allows employers to choose between starting the COBRA continuation period: as of the date a QE occurs or later when the date coverage actually ends, which is typically is the last day of the month in which a QE occurs. The commenter opines that the new law prohibits carriers from ending coverage until the last day of the month in which the insurer receives notice of the QE from the group policyholder or contract holder and also asserts that carriers will need to adjust (and delay) the "active" coverage termination date and charge the employer instead of the employee for the premium for that period. The commenter asks how the Department reconciles the incongruence between the new law and the employer's usual COBRA practices and requests clarification of how the "end of the month rule" affects the COBRA member's COBRA continuation period and COBRA coverage rights. To the extent that an employer or COBRA administrator "feeds" a mid-month coverage termination date to the insurer, the commenter questions whether the insurer can or must adjust that retroactive, mid-month termination date to the last day of the notice month (subject to the grace period rule).

Agency Response: In response to the commenter's first query, subsection (e) of the rule allows employers to continue to choose between starting COBRA continuation as of the date of the QE or when the date coverage actually ends. In response to the commenter's second query, Senate Bill 51, as implemented by this rule, does not interfere with employers' usual COBRA practices. If an employer starts COBRA the last day of the month of a QE, that will correspond to the last day of coverage under Senate Bill 51 as long as the employer provides timely notification. If the employer starts COBRA as of the date of the QE, then under subsection (e) of §21.4003, the employer's premium payment obligation ends upon proof to the carrier that the individual is now under successor coverage (the same plan, but with different eligibility standards and obligation for payment of premium).

The contractual coverage period will also direct an insurer's actions regarding billing and initiation of COBRA coverage. If the contract between the carrier and the employer already provides coverage through the end of the month, as is the case in the great majority of situations according to testimony at the hearing on this rule, Senate Bill 51 will have no bearing if the group policyholder or contract holder provides timely notification. If coverage terminates on the date employment terminates, carriers and employers will have to determine how to allocate premium between the employer and the ex-employee. To illustrate this principle, assume a company has coverage that terminates at the end of employment, a coverage contract based on a calendar month, and an employee that leaves employment on May 15. Senate Bill 51 would obligate the employer to pay premium for this individual through the end of May. If the individual then elects COBRA on June 9, the employer could begin COBRA coverage either at the end of May or as of the earlier QE. If COBRA begins May 15, the employer would be entitled to recoup its premium payment for the remainder of May from the first COBRA payment made by the employee.

§21.4003(f): A commenter requests that this provision either be entirely deleted or limited to situations where the policy is converted from a group policy to an individual policy as permitted by Insurance Code §§1251.256 - 1251.259. The commenter states that if this exception is limited to the group policies, subsection (e), which clarifies that any new coverage should be effective immediately upon coverage termination under the group health plan, should mirror that language. According to the commenter, while employees who elect COBRA are obligated to pay the premiums, Insurance Code §1251.252 states that an individual is entitled to continuation of group coverage under certain circumstances and would not be terminated from group eligibility in those instances. With COBRA elections, the commenter suggests that the group policyholder or contract holder must still transmit the premium to the carrier and notify the carrier of the termination.

Agency Response: The Department disagrees with the suggested change to delete the entire subsection or limit it to situations where the policy is converted from a group policy to an individual policy. This subsection is necessary to implement and clarify Senate Bill 51. While COBRA and other continuation provisions may entitle an individual to continue group coverage for a statutorily-specified period under special eligibility laws, the individual is no longer part of the group eligible for coverage. The Department agrees that a group policyholder or contract holder may retain an obligation to transmit premium and enrollment data to a health carrier; however group policyholders or contract holders had this obligation prior to the enactment of Senate Bill 51. Neither the statute nor this rule in any way affects a carrier's rights and remedies against a group policyholder or contract holder that fails to meet its obligations of this nature. The Department has, however, changed the lead-in sentence language of this subsection in response to comments and for clarification. Subsection (f) as adopted contains the following lead-in sentence language: "[a] group policyholder or contract holder is not liable for an individual insured's or an enrollee's premiums, and a health carrier is not obligated to continue coverage, under subsection (a) of this section under coverage a health carrier extends to an individual in compliance. . . ."

§21.4003(f): A commenter recommends the addition of a new paragraph in this subsection to clarify that subsection (a) of this section does not apply to coverage a health carrier extends to an individual "that is immediately followed by continuation coverage elected by or on behalf of an individual insured or enrollee."

Agency Response: The Department disagrees with the commenter's suggested change because subsection (e) allows an employer to end its premium payment obligation under Senate Bill 51 when its ex-employee obtains successor coverage, including continuation coverage. The Department has, however, changed the proposed term "new" to "successor" in subsection (e) to clarify this right. Additionally, the Department has made a technical change to the lead-in sentence language of this section for clarification.

§21.4003(f): The commenter interprets the rule to exempt all groups subject to continuation of coverage laws from the effect of Senate Bill 51 but expresses understanding that the Department's interpretation is solely to end a group policyholder's or contract holder's obligation once an individual has begun continuation coverage. The commenter states enforcement of Senate Bill 51 on employers subject to COBRA, and to a lesser degree Uniformed Services Employment and Reemployment Rights Act (USERRA) and State Continuation, would effectively block an employer's rights granted in U.S. Treasury Department regulation 26 C.F.R. §54.4989B-8, which allows for both retroactive termination and reinstatement of coverage. The commenter urges that Senate Bill 51 should only apply to employer groups of less than 20 lives not subject to the USERRA when employees have been on the plan for less than the statutory 90 days to be eligible for state continuation.

Agency Response: The Department disagrees with the suggested change because Senate Bill 51 applies to group policyholders and group contract holders regardless of the size of the employer. The commenter's suggestion is over-inclusive in that it would affect even individuals that do not elect continuation coverage. Subsection (f) provides relief to a group policyholder or contract holder when an individual elects continuation of coverage, but not in all circumstances. Additionally, the cited Treasury Department regulation applies only after inception of COBRA or similar federal continuation of coverage. The rule simply clarifies that the employer no longer has responsibility after the inception of continuation coverage; therefore, the statute and the rule do not conflict with the federal regulations.

§21.4003(f): A commenter requests additional language listing federal health plans not covered by Senate Bill 51 (e.g., Medicare, Medicaid, FMLA) and other plans covering federal employees exclusively.

Agency Response: The Department disagrees that this listing is necessary. Senate Bill 51 applies to coverage plans issued pursuant to the Insurance Code Chapters 843 and 1301. If a federal employee health plan is not issued pursuant to the authority of one of these two chapters, then Senate Bill 51 does not apply to it. The reason the rule specifically addresses continuation coverage is because carriers frequently provide such coverage through Insurance Code Chapter 843 or 1301 plans.

§21.4003(f) - (g): A commenter recommends that these subsections remain as proposed because they relieve the employer from continuing coverage if they do not contribute premium.

Agency Response: The Department agrees with the commenter that the subsections should remain substantively unchanged as proposed. The Department, however, has made a clarifying change to the lead-in sentence language in each of these two subsections as adopted, which reads "[a] group policyholder or group contract holder is not liable for an individual insured's or an enrollee's premiums, and a health carrier is not obligated to continue coverage, under subsection (a) of this section if . . . ."

§21.4003(g): A commenter states that this subsection is a desirable provision and specifically requests it remain in the rule.

Agency Response: The Department has retained this subsection in the adoption.

§21.4003(g): A commenter questions the statutory authority for this subsection and states that it would be helpful if the rule included examples. The commenter states that, while some employers make employees fully responsible for premium payments, these employers have established a group plan and will have contracts with health carriers that obligate them to transmit the paid premiums to the carrier and comply with the notice requirements of the law. Another commenter requests that the Department add the following examples to this subsection for clarification of the intent to exempt group policyholders or contract holders who do not have employer relationships or contribute no funds for any covered individual: (1) an association who has no employer-employee relationship and contributes no premium, but provides association dues-paying members the opportunity for coverage and agrees to bill 100% premium to members and remit this to the carrier; (2) an association that contributes to the cost of premium for six full-time employees of the association; and (3) an employer that contributes to the cost of employee premium but not for dependent premium under its group plan.

Agency Response: The statutory authority for this subsection is the plain language of §843.210 and §1301.0061 of the Insurance Code which provides that in addition to other premiums for which the group policyholder or contract holder is liable, group policyholders or contract holders are responsible for the obligation to continue premium payments and coverage, as well as the rulemaking authority granted to the Commissioner in Insurance Code §§843.151, 1301.007, and 36.001. The Department agrees that a group policyholder or contract holder may retain an obligation to transmit premium and enrollment data to a health

carrier; however, group policyholders or contract holders had this obligation prior to the enactment of Senate Bill 51. Neither the statute nor this rule in any way affects a carrier's rights and remedies against a group policyholder or contract holder that fails to meet its obligations of this nature. This rule provision operates simply to provide exemption from liability for premium payment imposed by subsection (a) for a group policyholder or contract holder that does not contribute to the premium payment for any individual covered by the policy or contract. If the group policyholder or contract holder does contribute, then the group policyholder or contract holder is not exempt. While the Department does not agree that it is necessary to add the suggested examples to the rule text, the Department will discuss the suggested examples in this response to enhance compliance as entities conform their practices to the adopted regulation. Association group members are eligible for group insurance based upon their membership in a group formed for a purpose other than to obtain insurance coverage (e.g., teachers' or physicians' associations). Under the adopted rule, the group contract holder in example one would be exempt from the premium payment requirements of Senate Bill 51, and the issuing carrier would be exempt from the coverage requirement. In examples two and three, the premium contributions would make Senate Bill 51 requirements apply. In addition, the plan described in example two, covering employees of the association, would be subject to Chapter 1501 of the Insurance Code and the uniform contribution requirements of Insurance Code §1501.153, so it would not appear that a single plan could cover both employees and association members.

§21.4003(g): Commenters state that this subsection is unfair, could burden business, and adversely impacts access to health coverage because it requires employers to pay all premiums for a former employee and a former employee's dependents if the employer tenders notification outside the "grace period," given that employers voluntarily offer health benefits to employees and often do not contribute any amount to dependent premium. Another commenter recommends substituting the words "to any dependent coverage where the" in place of "a health benefit plan for which a." Another commenter states that the proposal does not address the employer's responsibility for premium payments for the contribution requirement of 50% for terminated employees and 100% for dependents and asks whether they can recoup these contribution amounts by payroll deduction or billing.

Agency Response: The statute requires group policyholders or contract holders to pay premium and carriers to provide coverage. It does not place any obligations on individuals losing group eligibility. Neither does it provide a basis for treating dependents differently than primary group members, such as employees. The Department does not regulate, except in certain specified circumstances, the activities of employers. Accordingly, the Department does not agree with the recommended changes.

§21.4003(g): Another commenter asks that the rule clarify that an employer is not responsible for premium payment for any amounts other than what the employer would have paid for active employees because Senate Bill 51 does not require coverage and payment of such amounts.

Agency Response: The Department disagrees with the commenter's assertion that an employer is not responsible for premium payment for any amounts other than what the employer would have paid for active employees because Insurance Code §843.210(2) and §1301.0061(2), as added by Senate Bill 51, require that group policyholders and contract holders contractually assume liability for premiums until the end of the month in which an enrollee's or individual insured's coverage terminates and the carrier is notified. Senate Bill 51 is intended to prevent retroactive recovery of payments for medical services provided in good faith prior to the retroactive disenrollment of the employee by encouraging timely notification by employers. Therefore, the Department does not agree with the requested clarification.

§21.4003(h): A commenter questions the need for the language in this subsection that protects payment for covered services performed after a patient's death.

Agency Response: The Department disagrees with the commenter's suggestion that this subsection is unnecessary. A physician or provider may perform services after a patient's death. For example, a radiologist could interpret an x-ray taken prior to a patient's death before learning that the patient had died.

§21.4003(h): A commenter requests that this subsection be adopted as proposed because in certain instances employers may not immediately learn of the employee's death and should not be responsible for those premiums.

Agency Response: The Department agrees with the commenter and adopts the subsection as proposed with only minor changes for clarification.

§21.4003(h): A commenter requests that the Department consider clarifying the status of dependents left behind by a deceased member. Another commenter notes that the death of an employee does not terminate coverage of dependents.

Agency Response: The subsection affects the obligation to pay premium for and provide coverage to only the deceased individual. An individual's demise does not affect coverage obligations owed to dependents. Senate Bill 51 would continue to affect a group policyholder's or contract holder's and carrier's obligation toward any other individuals losing eligibility for group coverage. Therefore, the Department does not agree with the requested clarification.

§21.4003(h): A commenter states that the premium under a group policy is usually payable for an entire contract month. The commenter remarks that mid-month terminations due to death, divorce, or other circumstances would thus not result in unearned premium as the rate is based on the entire month.

Agency Response: As the commenter states, monthly premium arrangements are customary, but they are not exclusive. This subsection does not address or alter contractual premium payment arrangements but rather addresses only a party's obligations under Senate Bill 51. If an employer, for example, had contracted with a carrier for coverage that terminates when an employee loses group eligibility (in this instance due to death), this subsection would provide that the premium payment obligation under Senate Bill 51 would cease prior to the end of the month of notification. If the contracted coverage terminates only at the end of a month, then the employee's death would have no effect on premium payment or coverage obligations.

Miscellaneous: A commenter requests the addition of a new section to the proposed rule to allow carriers to use current contract amendments until a "reasonable time," to file new amendments. The commenter suggests 60 days after the Commissioner approves these rules. Some contract amendments were effective January 1, 2006, and carriers will need to file new amendments once these rules are adopted.

Agency Response: Insurance Code §843.210 and §1301.0061 as added by Senate Bill 51 became effective September 1, 2005. The Department understands, however, that carriers will need time to effect the changes needed as a result of the adoption of these rules that implement Senate Bill 51. The Department disagrees that adding a new section to the rule to specify a particular date for implementing changes is necessary because implementation time may necessarily vary. The Department, however, urges and expects carriers to act expeditiously in updating forms and procedures.

Miscellaneous: Another commenter asks whether the rules apply to eligibility termination events that occurred in 2005, but were not reported until 2006.

Agency Response: According to §5 of Senate Bill 51, Insurance Code §843.210 and §1301.0061 apply only to a contract between an insurer or health maintenance organization and a group policy or contract holder that is entered into or renewed on or after January 1, 2006. A contract entered into or renewed before January 1, 2006, is governed by the law in effect immediately before the Senate Bill 51 effective date of September 1, 2005. The rule only applies to eligibility termination events that are governed by Senate Bill 51, and no event in 2005 would have occurred under a contract subject to Senate Bill 51.

Miscellaneous: A commenter asks whether Insurance Code Chapters 843 and 1301 and Senate Bill 51 apply to dental insurance products and vision insurance products that provide access to network providers for eye exams and network retail suppliers.

Agency Response: The scope of Senate Bill 51 is expressed by type of plan, not by type of benefits or services. Health care coverage plans issued pursuant to the authority of Insurance Code Chapters 843 and 1301 are subject to Senate Bill 51. If a carrier issues a vision or dental coverage contract pursuant to one of these chapters, then the contract is subject to Senate Bill 51. Insurance Code §1301.002, however, states that Chapter 1301 does not apply to a provision for dental care benefits in a health insurance policy.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS. For with changes: Administaff, Inc.; Aetna; BlueCross BlueShield of Texas; Humana; Infinisource, Inc.; Insurance Network of Texas; Office of Public Insurance Counsel; The Benefits Office; Texas Association of Business; Texas Association of Health Plans; Texas Association of Health Underwriters; Texas Association of Life and Health Insurers; Texas Hospital Association; Texas Medical Association; Texas & Southwestern Cattle Raisers Association; and Unicare.

Against: None.

The new sections are adopted under Insurance Code §§843.210, 1301.0061, 843.151, 1301.007, and 36.001. Section 843.210 and §1301.0061 address the obligation of certain group health coverage policyholders and contract holders to continue premium payment, and a carrier's corresponding obligation to continue coverage, after notice of an individual's lost group eligibility. Section 843.151 provides that the Commissioner may adopt reasonable rules as necessary and proper to fully implement the Insurance Code Chapter 843 and Article 20A (non-substantive revision of Article 20A enacted by the 78th Legislature as Chapter 1271, effective April 1, 2005). Section 1301.007 provides that the Commissioner shall adopt rules as necessary to implement Chapter 1301 and to ensure reasonable accessibility and availability of preferred provider benefits and basic level of benefits to residents of this state. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§21.4001. Purpose and Scope.

This subchapter applies to group preferred provider benefit plans and evidences of coverage issued pursuant to Insurance Code Chapters 843 and 1301. The subchapter outlines a group policyholder's or group contract holder's liability for premium payment, and a health carrier's obligation to provide coverage, from the time an individual insured or enrollee loses eligibility for coverage as part of a particular group until the end of the month in which the group policyholder or group contract holder notifies the health carrier that the individual is no longer part of the group eligible for coverage. The subchapter does not impose requirements on a group policyholder, a group contract holder, or a health carrier when an entire group ends coverage under a health benefit plan or when an individual terminates coverage while remaining part of the group eligible for coverage.

§21.4002. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Evidence of coverage--Any certificate, agreement, or contract, including a blended contract, that:

(A) is issued to an enrollee; and

(B) states the coverage to which the enrollee is entitled.

(2) Health benefit plan--A preferred provider benefit plan or health maintenance organization evidence of coverage or other group health benefit plan issued by a health maintenance organization.

(3) Health carrier--A health insurer issuing a preferred provider benefit plan, as defined in Insurance Code §1301.001(9), or a health maintenance organization, as defined in Insurance Code §843.002(14).

(4) Health insurer--A life, health, and accident insurance company, health and accident insurance company, health insurance company, or other company operating under Insurance Code Chapters 841, 842, 884, 885, 982, or 1501 that is authorized to issue, deliver, or issue for delivery in this state health insurance policies.

(5) Health maintenance organization--A person who arranges for or provides to enrollees on a prepaid basis a health care plan, a limited health care service plan, or a single health care service plan as defined in Insurance Code §843.002(14).

(6) Month--The period from a date in a calendar month to the corresponding date in the succeeding calendar month, as provided in the group policy or contract. If the succeeding calendar month does not have a corresponding date, the period ends on the last day of the succeeding calendar month.

(7) Preferred provider benefit plan--Any policy or contract issued pursuant to Insurance Code Chapter 1301.

§21.4003. Group Policyholder, Group Contract Holder, and Carrier Premium Payment and Coverage Obligations.

(a) A contract between a health carrier and a group policyholder or group contract holder under a health benefit plan contract must provide that:

(1) the group policyholder or group contract holder, as described in Insurance Code Chapter 1251, is liable for an individual insured's or enrollee's premiums from the time the individual is no longer

part of the group eligible for coverage under the plan until the end of the month in which the group policyholder or group contract holder notifies the health carrier that the individual is no longer part of the group eligible for coverage under the plan; and

(2) the individual remains covered under the plan until the end of the period specified in paragraph (1) of this subsection.

(b) If a health carrier agrees that a group policyholder or group contract holder may tender the notice referenced in subsection (a)(1) of this section by mail, the date the group policyholder or group contract holder tenders the notice to the postal service is the date the group policyholder or group contract holder notifies the health carrier. Evidence of written notifications may be maintained in a mail log in order to provide proof of submission and establish date of receipt.

(c) If an individual or an enrollee ceases to be a part of the group eligible for coverage within seven calendar days prior to the end of the month, the group policyholder or group contract holder will be deemed to have notified the health carrier in the month in which the individual or enrollee ceases to be part of the group if the health carrier receives notification within the first three days of the subsequent month, not including Saturdays, Sundays, and legal holidays. If the notification is sent during this additional three-day notification period, the policyholder or contract holder must transmit the notification of an individual's loss of eligibility during the previous month by a method:

(1) agreed upon by the group policyholder or group contract holder and the carrier, and

(2) that provides immediate written notification, such as an internet portal, electronic mail, or telefacsimile. Immediate written notification sent via electronic means will be presumed received on the date it is submitted; hand-delivered notification will be presumed received on the date the delivery receipt is signed.

(d) A group policyholder or group contract holder is not liable for an individual insured's or an enrollee's premiums, and a health carrier is not obligated to continue coverage, under subsection (a) of this section if a group policyholder or group contract holder notifies a health carrier that an individual will no longer be part of the group eligible for coverage at least 30 days prior to the date the individual will no longer be part of the group eligible for coverage.

(e) A group policyholder or group contract holder is not liable for an individual insured's or an enrollee's premiums, and a health carrier is not obligated to continue coverage, under subsection (a) of this section if the individual elects to terminate coverage under the plan and obtains coverage under a successor health benefit plan that takes effect at any time after termination of group eligibility and before the end of the coverage and premium payment period required by Insurance Code §843.210 and §1301.0061 and subsection (a) of this section. A health carrier may require a group policyholder or group contract holder seeking to avoid payment of additional premium for an individual no longer part of the group eligible for coverage to verify the successor coverage and to agree to be responsible for payment of premium if the individual's successor health benefit plan does not cover the individual from the termination of the health carrier's coverage until the end of the month in which the group policyholder or group contract holder notifies the health carrier that the individual is no longer part of the group eligible for coverage. In addition, the group policyholder or group contract holder and the health carrier remain responsible for compliance with Insurance Code §843.210 and §1301.0061 if the individual's successor health benefit plan does not cover the individual from the termination of the health carrier's coverage until the end of the month in which the group policyholder or group contract holder notifies the health carrier that the individual is no longer part of the group eligible for coverage.

(f) A group policyholder or group contract holder is not liable for an individual insured's or an enrollee's premiums, and a health carrier is not obligated to continue coverage, under subsection (a) of this section under coverage a health carrier extends to an individual in compliance with 29 U.S.C. §1161 et seq. (COBRA), Insurance Code Chapter 1251 Subchapter F, or any other federal or state continuation of coverage requirement that allows an individual insured or enrollee, upon termination of eligibility from a group, to pay premium and extend the period of group health benefit plan coverage after the individual has left employment or otherwise no longer qualifies as a member of the group.

(g) A group policyholder or group contract holder is not liable for an individual insured's or an enrollee's premiums, and a health carrier is not obligated to continue coverage, under subsection (a) of this section if a group policyholder or group contract holder does not contribute to the payment of any individual insured's or enrollee's premium.

(h) A group policyholder or group contract holder is not liable for an individual insured's or an enrollee's premiums, and a health carrier is not obligated to continue coverage, under subsection (a) of this section in the event of the individual insured's or enrollee's death after the later of the date of the individual insured's or enrollee's:

(1) death; or

(2) receipt of the last covered service under the plan.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 27, 2006.

TRD-200603466
Brenda Caldwell
Assistant General Counsel
Texas Department of Insurance
Effective date: July 17, 2006
Proposal publication date: February 10, 2006
For further information, please call: (512) 463-6327

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 25. ENVIRONMENTAL TESTING LABORATORY ACCREDITATION AND CERTIFICATION

The Texas Commission on Environmental Quality (commission or TCEQ) adopts amendments to §25.9 and §25.62 *without changes* to the proposed text as published in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2389) and the text will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the adopted rules is to refer to more recent laboratory accreditation standards adopted by the National Environmental Laboratory Accreditation Conference (NELAC) and to expand the sources of proficiency test samples for drinking water

laboratories seeking or holding certifications issued by the commission.

SECTION BY SECTION DISCUSSION

Adopted §25.9, Standards for Environmental Testing Laboratory Accreditation, replaces the phrase "Chapters 3, 4, and 5, adopted July 2002, and Chapters 1, 2, and 6, adopted June 2003" with "approved June 2003" to refer to the most recent laboratory accreditation standards adopted by NELAC.

Adopted §25.62(d), Proficiency Test Sample Analyses, replaces the phrase "Proficiency test samples shall be purchased from a provider approved by the National Institute for Standards and Technology, if available" with "Proficiency test samples, if available, shall be purchased from a National Environmental Laboratory Accreditation Program-designated provider or a provider approved by the National Institute of Standards and Technology." The change expands the number of potential sources of proficiency test samples for drinking water laboratories seeking or holding certifications issued by the commission.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a major environmental rule. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking updates the agency's standards for accreditation and expands the number of potential sources of proficiency test samples for drinking water laboratories seeking or holding certifications issued by the commission. Thus, these rules do not meet the definition of a "major environmental rule." These rules are not a major environmental rule and do not meet any of the four applicability requirements that apply to a major environmental rule. Under Texas Government Code, §2001.0225, the adopted rules do not exceed a standard set by federal law or a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. The adopted rules do not exceed a standard set by federal law nor exceed the requirement of a delegation agreement because there is no federal authority regarding laboratory accreditation.

These revisions do not adopt a rule solely under the general powers of the commission and do not exceed an express requirement of state law. The requirements that are implemented through these rules are expressly defined under Texas Water Code (TWC), Chapter 5, Subchapter R, which requires the commission to enact rules governing the accreditation of environmental laboratories.

TAKINGS IMPACT ASSESSMENT

The commission's final assessment indicates that Texas Government Code, Chapter 2007, does not apply to these adopted amendments because the adopted amendments are not a taking as defined in Chapter 2007, nor are they a constitutional taking of private real property. The purpose of the adopted amendments is to update NELAC standards referenced in these rules.

Promulgation and enforcement of these adopted rules will not affect private real property, which is the subject of the rules, because the adopted amendments will neither restrict nor limit the owner's right to the property, nor cause a reduction of 25% or more in the market value of the property. The adopted rules only apply to environmental testing laboratories that submit data to the commission for use in its decisions. Property values will not be decreased because the adopted amendments will not limit the use of real property. Thus, these adopted rules will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking and found that the adoption is not a rulemaking subject to the Texas Coastal Management Program (CMP) because the rulemaking was neither identified in 31 TAC §505.11, nor affected any action or authorization identified in §505.11. Therefore, the adoption is not subject to the CMP.

PUBLIC COMMENT

The commission received no comments concerning this rulemaking.

SUBCHAPTER B. ENVIRONMENTAL TESTING LABORATORY ACCREDITATION

30 TAC §25.9

STATUTORY AUTHORITY

The amendment is adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; and §5.802 and §5.805, which require the agency to adopt rules for the administration of the laboratory accreditation program.

The adopted amendment implements TWC, §§5.013, 5.103, 5.105, 5.802, and 5.805.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603518
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 19, 2006
Proposal publication date: March 24, 2006
For further information, please call: (512) 239-5017

♦ ♦ ♦

SUBCHAPTER C. ENVIRONMENTAL TESTING LABORATORY CERTIFICATION

30 TAC §25.62

STATUTORY AUTHORITY

The amendment is adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; and §5.802 and §5.805, which require the agency to adopt rules for the administration of the laboratory accreditation program.

The adopted amendment implements TWC, §§5.013, 5.103, 5.105, 5.802, and 5.805.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603519
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 19, 2006
Proposal publication date: March 24, 2006
For further information, please call: (512) 239-5017

♦ ♦ ♦

CHAPTER 35. EMERGENCY AND TEMPORARY ORDERS AND PERMITS; TEMPORARY SUSPENSION OR AMENDMENT OF PERMIT CONDITIONS

SUBCHAPTER K. AIR ORDERS

30 TAC §§35.801, 35.802, 35.804, 35.805, 35.807, 35.808

The Texas Commission on Environmental Quality (commission or TCEQ) adopts amendments to §§35.801, 35.802, 35.804, 35.805, 35.807, and 35.808 *without changes* to the proposed text as published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1599) and these sections will not be republished.

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

House Bill (HB) 2949, 79th Legislature, 2005, amended Texas Water Code (TWC), §5.515, to allow for authorization of emergency orders to repair or replace roads, bridges, or other infrastructure improvements involving public works projects destroyed during a catastrophe. The TWC previously only authorized emergency orders to allow repair of a facility or control equipment. Amended TWC, §5.515 adds language regarding the contents of the application for an emergency order. The required language in the application pertaining to the reason for allowing the construction and emissions was expanded to include preventing a "loss of a critical transportation thoroughfare." The purpose of this rulemaking is to reflect these changes in Subchapter K of this chapter.

The adopted rules add language authorizing emergency orders to include repair or replacement of roads, bridges, or other infrastructure improvements to the list of actions that can be authorized by an emergency order. Additionally, the adopted rules authorize an applicant to list loss of a critical transportation thoroughfare as a reason why the construction and emissions are essential. As a point of clarification, it is noted that the issuance of an emergency order, under the adopted rules, to a rock crusher or concrete batch plant that performs wet batching, dry batching, or central mixing will not be prohibited under TWC, §5.5145, or subject to penalty under TWC, §7.052(b), because the facility is considered to be operating under a temporary authorization as provided in TWC, §5.501(a)(2)(A). A facility which has been issued an emergency order has been provided a limited-term authorization and must submit an application for a permit or permit modification within 60 days of the order issuance, as described in 30 TAC §35.806.

SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout the rules to conform with Texas Register requirements and agency guidelines.

The adopted amendment to §35.801, Emergency Orders Because of Catastrophe, adds roads, bridges, or other infrastructure to the list of repairs or replacements for which the commission may authorize immediate action. The commission also revises the definition of catastrophe by replacing the word "operator" with the word "applicant" and by adding the language "or a road, bridge, or other infrastructure."

The adopted amendment to §35.802, Application of an Emergency Order, adds language, in paragraphs (1) and (5), allowing an applicant to state that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure to the list of possible statements in an application for an emergency order of why the construction and emissions are necessary. In describing the limitations on the proposed construction and emissions, the applicant may cite the public works project as the specific basis for the emergency authorization.

The adopted amendment to §35.804, Issuance of Order, adds language to the list in paragraph (1) of possible reasons that would allow the commission to issue an emergency order, allowing the commission to issue an order under this subchapter if it is found that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure. New §35.804(5)(C), adds public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe to the list of limitations of the proposed construction and emissions.

The adopted amendment to §35.805, Contents of an Emergency Order, adds in paragraph (3), public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe to the list of limitations of the proposed construction and emissions.

The adopted amendment to §35.807, Affirmation of an Emergency Order, adds language to the list in paragraph (1) of possible reasons that would allow the commission to issue an emergency order, allowing the commission to affirm a proposed or issued order under this subchapter if the applicant shows that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and

that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure. New §35.807(5)(C) adds public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe to the list of limitations of the proposed construction and emissions.

The adopted amendment to §35.808, Modification of an Emergency Order, adds language, in paragraph (1), allowing the commission to modify a proposed or issued order under this subchapter if the applicant shows that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from exposure and that may adversely affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission has determined that the adopted rulemaking does not fall under the definition of a "major environmental rule" because it does not adversely affect any of the categories listed in §2001.0225, and the amendments do not mandate new requirements for the regulated community. Rather, the adopted rules are intended to reflect the statutory changes made to TWC, §5.515, by HB 2949, which provide authorization for specific types of facilities that may emit air contaminants in limited circumstances. Material adverse effects on the environment are not anticipated, and the impacts on the economy and productivity are expected to be significant and positive insofar as recoveries from catastrophic events will be more quickly and efficiently realized.

Furthermore, the adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed the requirements of state law under TWC, Chapter 5, Subchapter L; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program; and 4) is not proposed solely under the general powers of the agency, but rather specifically under TWC, §5.515.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an analysis of whether these rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of the rules is to incorporate into commission rules the changes made to TWC, §5.515, by the Texas Legislature, by adding language to authorize emergency orders in the event of a catastrophe to include the repair or replacement of roads, bridges, or other infrastructure.

Promulgation and enforcement of the amendments would constitute neither a statutory nor a constitutional taking of private real property. There are no burdens imposed on private real property under this rulemaking because the amendments neither relate to, nor have any impact on, the use or enjoyment of private real property, and there would be no reduction in value of property as a result of this rulemaking. None of the adopted rules mandate any new requirements, but rather, provide for a specific type of authorization.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the rulemaking is one identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The CMP goal applicable to the adopted rules is to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the adopted rules include the administrative policies and the policies for specific activities related to the emission of air pollutants. Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the rules will establish clear and consistent requirements governing the issuance of emergency and temporary orders for the repair or replacement of roads, bridges, or other infrastructure when necessitated by a catastrophe, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen circumstances such as potential catastrophes. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because they will allow the commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

PUBLIC COMMENT

A public hearing on the proposed rules was held in Austin on April 4, 2006, at the Texas Commission on Environmental Quality but no oral comments were received. Written comments were submitted by the North Central Texas Council of Governments (NCTCOG) and the EPA.

RESPONSE TO COMMENTS

NCTCOG supported the amendments and commented that construction associated with emergency orders issued for the repair of infrastructure destroyed during a catastrophe may mitigate long-term emissions due to congestion which may result from an unresolved infrastructure failure.

The commission appreciates the support and concurs in the rationale proffered by NCTCOG that identifies potential environ-

mental benefits which may result through the use of the emergency order authorization tool.

EPA commented that it interprets TWC, §5.501, to provide the commission with the general authority to issue temporary or emergency orders. The EPA further stated its understanding that through these orders, the commission may issue a temporary permit or temporarily suspend or amend a permit condition.

Section 5.501 does include authority to issue a temporary permit or temporarily suspend or amend a permit condition. However, the commission has never issued a temporary permit in lieu of a conventional authorization method for facilities with air emissions. The authority exercised through the Chapter 35 rules and this rulemaking is for issuance of emergency orders. Emergency orders are most accurately described as limited-term authorizations necessary to respond to certain catastrophic events. For example, in one instance, an emergency order was issued to install a larger boiler to replace two smaller boilers that were damaged in a catastrophic event until the two smaller boilers could be repaired. However, the larger boiler was not allowed to operate at a firing rate that would create emissions greater than the permitted limit for the two boilers, thus providing a limited-term authorization for the larger boiler, with no greater impact on the environment. The emergency order rules require that a facility which has been issued an emergency order submit an application for a permit or permit modification within 60 days of the order issuance.

EPA expressed its understanding that the Chapter 35 emergency order rules enable the commission to authorize a temporary permit or suspension of permit requirements without necessitating the submission of any such action to the EPA as a revision to the SIP. EPA stated that such an arrangement, which it identified as "director discretion," would run afoul of the requirement for the submission of a SIP revision contained in Federal Clean Air Act, §110(I).

The Chapter 35 emergency order rules, as amended through this adoption, do not contemplate the issuance or suspension of a permit or permit conditions. Rather, the rules authorize the issuance of a limited-term authorization necessary to respond to certain catastrophic events.

EPA expressed concern that the proposed amendments would allow a source to avoid preconstruction requirements and permit review procedures, while authorizing emissions in contravention of state and federal requirements. Specifically, EPA stated that any SIP revision submittal must demonstrate that the proposed revision would not interfere with the attainment or maintenance of the National Ambient Air Quality Standards (NAAQS), Prevention of Significant Deterioration (PSD) requirements, or negatively affect the existing air quality in Texas.

The Chapter 35 emergency order rules, as amended through this adoption, contemplate and call for a comprehensive technical review. As set forth in 30 TAC §35.805, and other sections in Subchapter K, as well as within each issued emergency order, any construction authorized by an emergency order may not interfere with the attainment or maintenance of the NAAQS or violate applicable portions of the control strategy. To that end, the review of emergency order applications conducted by the commission consists of an evaluation of best available control technology (BACT) and a review of potential impacts of human health and the environment by the use of air dispersion modeling and evaluation by the commission's Toxicology Section. The review also includes input from the commission's applicable regional office and the commission's Air Permits Division, as appropriate. The review will ensure that the construction is subject to current and possibly more stringent requirements than were in existence for facilities that are being replaced. The technical review process is at least as comprehensive as the commission's review of permit applications. Therefore, these rules, as a revision to the SIP, do not interfere with attainment or maintenance of the NAAQS, violate PSD requirements, or negatively affect existing air quality in Texas.

Additionally, the emergency order rules require that a facility which has been issued an emergency order submit an application for a permit or permit modification within 60 days of the order issuance. As set forth in 30 TAC §35.806, the permit application will be considered without regard to the activity(ies) authorized under an emergency order. Since 1993, the commission has issued approximately 13 air emergency orders. The majority of these authorized replacement or repairs of damaged facilities and/or control equipment, while a few authorized new facilities and one authorized a different loading operation. In a number of cases, operation under the emergency order authority actually lasted less than the maximum 180-day term (one was operated for less than one week). Therefore, the impact to the environment was relatively minimal, and permit applications were not necessary for all of these authorizations.

EPA commented that under certain extraordinary circumstances, such as natural disasters, the commission could exercise its enforcement discretion. EPA intends to review such circumstances on a case-by-case basis.

Historically, the commission has not encountered unauthorized construction after natural disasters or other catastrophic events, and therefore there have been few opportunities, if any, to choose between exercising enforcement discretion and consideration of issuance of an emergency order. The rules in Subchapter K anticipate that an application for an emergency order be submitted prior to construction of the replacement facilities. If a facility was constructed without authorization, it would be operating without having undergone a BACT or health impacts review. However, when confronted with an application for a temporary authorization necessitated by the occurrence of a catastrophic event, the commission prefers to rely upon the emergency order authorization tool in order to ensure that a comprehensive review is conducted, which is a case-by-case review that should meet EPA requirements. As noted earlier in this preamble, the commission has issued very few emergency orders; some were due to catastrophic events that were also natural disasters.

EPA indicated that it may be able to approve the emergency order program, as submitted through previous SIP revisions, assuming that when considering the issuance of an emergency order, the state incorporates a review process which is equivalent to the process used in considering an application for a regular permit.

As described earlier, the review of applications for emergency orders is at least as comprehensive as the commission's review of permit applications. Additionally, the emergency order rules require that a facility which has been issued an emergency order submit an application for a permit or permit modification within 60 days of the order issuance. As set forth in 30 TAC §35.806, the permit application will be considered without regard to the activity(ies) authorized under an emergency order. Therefore, a person who is granted an emergency order is on notice that there is no guarantee that the subsequent permit application will

be granted and, if so, whether the construction and operating requirements will be the same.

EPA requested clarification on what authority the TCEQ relies upon in requiring a technical review of emergency order applications which contains modeling, BACT, lowest achievable emission rate, Class I impacts, and impacts on soils, vegetation, and visibility.

As indicated earlier, the Chapter 35 emergency order rules, as amended through this adoption, contemplate and call for a comprehensive technical review. As set forth in 30 TAC §35.805, as well as within each issued emergency order, any construction authorized by an emergency order may not interfere with the attainment or maintenance of NAAQS or violate applicable portions of the control strategy. The commission interprets this directive to necessitate a comprehensive impacts review as described in previous responses to comments. This interpretation is grounded in Texas Health and Safety Code (THSC), §382.024. Such a review is also predicated upon the required showing that the activity authorized under an emergency order will not cause or contribute to air pollution, as set forth in TWC, §5.515(d). The applicant must also demonstrate that there will be no more than a *de minimus* increase in off-property air contaminant concentrations, per TWC, §5.515(c). To ensure that the emergency order will not violate applicable portions of the control strategy, the review will check for compliance with such applicable portions, for example, as permitting requirements, federal permitting applicability, new source performance standards (NSPS), national emissions standards for hazardous air pollutants (NESHAPS), and rules adopted for control of volatile organic compounds and nitrogen oxide emissions in nonattainment areas. Additionally, the TCEQ has in the past conducted and required applicants to conduct air dispersion modeling as appropriate to assure compliance.

EPA inquired as to what would happen if an entity was found to be in violation of a state or federal requirement after an emergency order was issued. Specifically, EPA wondered whether the emergency order issuance would shield such an entity from enforcement action.

An emergency order issued under Chapter 35 would not shield an entity from an enforcement action brought for violating a state or federal requirement or the terms of the emergency order. Additionally, each emergency order issued by the executive director will be considered by the commission during an open public meeting and must be affirmed, set aside, or modified, which provides the commission the opportunity to ensure compliance with such requirements.

EPA commented that 30 TAC §116.410 allows a facility to apply for an emergency order under TWC, §5.515, while Chapter 35 of the Texas Administrative Code authorizes immediate action under an emergency order. EPA wondered whether a source may submit a single application for an emergency order or must submit two applications.

The rules pertaining to emergency orders have been moved in their entirety to Chapter 35. There remains a reference to emergency orders in 30 TAC §116.1200, renumbered from 30 TAC §116.410, effective February 1, 2006, which directs the public to Chapter 35. Only one application is required.

EPA sought the commission's interpretation on whether TWC, §5.515 must be submitted and approved into the SIP.

The legal authority to adopt the emergency order rules adopted and submitted to EPA in 1998 and these amendments is listed in the STATUTORY AUTHORITY sections of the rulemaking documents, and as such, is submitted to EPA for its review as part of this revision into the SIP.

EPA sought the commission's interpretation on what provisions of Chapter 35 need to be approved into the SIP for air purposes.

Through this rulemaking, the commission is submitting amendments to Subchapter K of Chapter 35. Subchapter K has previously been submitted as a revision to the SIP. Since this rulemaking is not opening Chapter 35, Subchapters A - C, nor were subsections in Subchapters A - C proposed for removal from consideration as a revision to the SIP, the commission cannot revise the SIP submission at adoption of these rules to concurrently designate applicable subsections within those subchapters.

EPA questioned where the term "*de minimis* increase" as used in the current Chapter 35 emergency order provisions is defined for all criteria pollutants. Further, EPA asks if there is an ambient *de minimis* threshold for ozone or ozone precursors and where the term "national ambient air quality standards" is defined.

In determining *de minimus* amounts for purposes of reviewing emergency order applications, the commission refers to the definition of "*de minimis* impact" in 30 TAC §101.1(25) as a guideline for assessing truly *de minimus* amounts of air contaminants. A "*de minimis* impact" is defined as "A change in ground level concentration of an air contaminant as a result of the operation of any new major stationary source or of the operation of any existing source that has undergone a major modification that does not exceed the following specified amounts." The referenced specified amounts are set forth in an attached chart. The chart provides various amounts by NAAQS averaging times, for carbon monoxide, nitrogen dioxide, sulfur dioxide, and particulate matter greater than 10 microns (PM_{10}), ranging from 1 to 25 micrograms per cubic meter.

While there is no ambient *de minimus* threshold for ozone or ozone precursors *per se*, the commission reviews each emergency order application and identifies whether there are any predicted adverse off-property concentrations of either criteria or non-criteria pollutants regardless if there is any increase in emissions. The definition of National Ambient Air Quality Standards is defined in 30 TAC §101.1(68).

STATUTORY AUTHORITY

These amendments are adopted under TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules to carry out its duties under the TWC and the other laws of the state; §5.105, which establishes the commission's authority to set policy by rule; §5.501, which establishes the commission's authority to issue emergency orders; §5.502, which sets forth requirements for emergency order applications; §5.504, which establishes the commission's authority to hold a hearing on the issuance of an emergency order; and §5.515, which allows the commission to issue emergency orders for immediate action for the addition, replacement, or repair of facilities or control equipment, or the repair or replacement of roads, bridges, or other infrastructure, and authorizing associated emissions of air contaminants, whenever a catastrophe necessitates such construction and emissions otherwise precluded under the Texas Clean Air Act (TCAA). In addition, these rules are adopted under THSC, §382.011, which gives the

commission the authority to control the quality of the state's air; §382.012, which authorizes the commission to develop a state air control plan; §382.017, which authorizes the commission to adopt rules implementing the TCAA; §382.024 and §382.025, which establish the authority of the commission to issue air orders and what factors the commission must consider when issuing such orders; and §382.063, which authorizes the commission to issue emergency orders because of catastrophe.

The adopted amendments implement TWC, §§5.501, 5.502, 5.504, and 5.515, and THSC, §§382.011, 382.012, 382.024, 382.025 and 382.063.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603529
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 20, 2006
Proposal publication date: March 10, 2006
For further information, please call: (512) 239-0348

♦ ♦ ♦

CHAPTER 39. PUBLIC NOTICE

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§39.501, 39.503, and 39.651 *with changes* to the text as published in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2403).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

House Bill (HB) 1609, 79th Legislature, 2005, amended Texas Health and Safety Code, §§361.0666, 361.0791, and 361.082, by making the applicant's public meeting and the TCEQ's public meeting on new hazardous waste management facilities and new municipal solid waste management facilities discretionary, rather than mandatory. In order to implement this change, the commission adopts amendments to §§39.501, 39.503, and 39.651 to reflect the change in statutory language from "shall hold a public meeting" to "may hold a public meeting."

SECTION BY SECTION DISCUSSION

Administrative and grammatical changes are adopted throughout the sections to bring the existing rule language into agreement with Texas Register requirements, agency guidelines, and guidance provided in the *Texas Legislative Council Drafting Manual*, November 2004.

The adopted amendments to §39.501(e), Application for Municipal Solid Waste Permit, distinguish between applications filed before September 1, 2005, the effective date of HB 1609, and applications filed on or after September 1, 2005. The mandatory public meeting requirements in paragraph (1) for applications filed before September 1, 2005, are left in place, changing the subject from the "applicant" to the "application" to conform to the language in Section 6 of HB 1609. New paragraph (2) is adopted for discretionary public meetings for applications filed on or after September 1, 2005, and removes the 45-day requirement for the applicant's public meeting. New paragraph (2)(A)(i) also specifies that the agency's public meeting will be held under 30 TAC §55.154 that, in turn, requires the executive director or the Office of Public Assistance to hold a public meeting if the executive director determines that there is a substantial or significant degree of public interest in an application or if a member of the legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held. At the direction of the commission, guidance on the executive director's discretion in determining substantial public interest in an application has been added by repeating a portion of Texas Water Code (TWC), §5.554 in new clause (ii). New paragraph (3) defines "substantial public interest" in terms of a local governmental entity with jurisdiction over the location at which the facility is proposed to be located by formal resolution of the entity's governing body; a council of governments with jurisdiction over the location at which the facility is proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board; a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is proposed to be located; or a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is proposed to be located. Existing paragraphs (2) - (4) are renumbered as paragraphs (4) - (6), and references back to paragraph (1)(A) in renumbered paragraphs (4) and (6) are made to refer back to paragraph (1)(A) or (2)(A) while the reference back to paragraph (1)(B) in renumbered paragraph (5) is made to refer back to paragraph (1)(B) or (2)(B).

The adopted amendments to §39.503(e)(1), Application for Industrial or Hazardous Waste Facility Permit, distinguish between applications filed before September 1, 2005, the effective date of HB 1609, and applications filed on or after September 1, 2005, changing the subject from the "applicant" to the "application" to conform to the language in Section 6 of HB 1609. New paragraph (1)(A) retains the mandatory public meeting for applications filed before September 1, 2005, while new paragraph (1)(B) makes the public meeting discretionary for applications filed on or after September 1, 2005. New paragraph (1)(B)(i) also specifies that the agency's public meeting will be held under 30 TAC §55.154 that, in turn, requires the executive director or the Office of Public Assistance to hold a public meeting if the executive director determines that there is a substantial or significant degree of public interest in an application or if a member of the legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held. At the direction of the commission, guidance on the executive director's discretion in determining substantial public interest in an application has been added by repeating a portion of TWC, §5.554 in new clause (ii).

The adopted amendments to §39.503(e)(2) distinguish between applications filed before September 1, 2005, the effective date of HB 1609, and applications filed on or after September 1, 2005, changing the subject from the "applicant" to the "application" to conform to the language in Section 6 of HB 1609 and including Class 3 modifications with major amendments. New paragraph (2)(A) retains the mandatory public meeting for applications filed before September 1, 2005, if a person affected files a request for a public meeting with the chief clerk concerning the application before the deadline to file public comment or hearing requests. New paragraph (2)(B) makes the public meeting discretionary for applications filed on or after September 1, 2005, and removes the affected person requirement deleted from the statute in HB 1609. New paragraph (2)(B)(i) also specifies that the agency's

public meeting will be held under §55.154 that, in turn, requires the executive director or the Office of Public Assistance to hold a public meeting if the executive director determines that there is a substantial or significant degree of public interest in an application or if a member of the legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held. At the direction of the commission, guidance on the executive director's discretion in determining substantial public interest in an application has been added by repeating a portion of TWC, §5.554 in new clause (ii). New paragraph (3) defines "substantial public interest" in terms of a local governmental entity with jurisdiction over the location at which the facility is located or proposed to be located by formal resolution of the entity's governing body; a council of governments with jurisdiction over the location at which the facility is located or proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board; a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is located or proposed to be located; or a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is located or proposed to be located. Existing paragraphs (3) - (6) are renumbered as paragraphs (4) - (7).

The adopted amendments to renumbered §39.503(e)(4) distinguish between applications filed before September 1, 2005, the effective date of HB 1609, and applications filed on or after September 1, 2005, changing the subject from the "applicant" to the "application" to conform to the language in Section 6 of HB 1609. New paragraph (3)(A) retains the applicant's mandatory public meeting for applications filed before September 1, 2005, and retains the 45-day deadline. New paragraph (3)(B) makes the applicant's public meeting discretionary for applications filed on or after September 1, 2005.

The adopted amendments to renumbered §39.503(e)(5) and (7) make references back to paragraph (1) refer back to paragraph (1) or (2).

The adopted amendments to §39.651(e)(1), Application for Injection Well Permit, distinguish between applications filed before September 1, 2005, the effective date of HB 1609, and applications filed on or after September 1, 2005, changing the subject from the "applicant" to the "application" to conform to the language in Section 6 of HB 1609. New paragraph (1)(A) retains the mandatory public meeting for applications filed before September 1, 2005, while new paragraph (1)(B) makes the public meeting discretionary for applications filed on or after September 1, 2005. New paragraph (1)(B)(i) also specifies that the agency's public meeting will be held under §55.154 that, in turn, requires the executive director or the Office of Public Assistance to hold a public meeting if the executive director determines that there is a substantial or significant degree of public interest in an application or if a member of the legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held. At the direction of the commission, guidance on the executive director's discretion in determining substantial public interest in an application has been added by repeating a portion of TWC, §5.554 in new clause (ii).

New §39.651(e)(2) separates the requirements for public meetings on applications for major amendments from old paragraph (1) and distinguishes between applications filed before September 1, 2005, the effective date of HB 1609, and applications filed on or after September 1, 2005, changing the subject from the "applicant" to the "application" to conform to the language in Section 6 of HB 1609 and including Class 3 modifications with major amendments. New paragraph (2)(A) retains the mandatory public meeting for applications filed before September 1, 2005, if a person affected files a request for public meeting with the chief clerk concerning the application before the deadline to file public comment or hearing requests. New paragraph (2)(B) makes the public meeting discretionary for applications filed on or after September 1, 2005, and removes the affected person requirement deleted from the statute in HB 1609. New paragraph (2)(B)(i) also specifies that the agency's public meeting will be held under §55.154 that, in turn, requires the executive director or the Office of Public Assistance to hold a public meeting if the executive director determines that there is a substantial or significant degree of public interest in an application or if a member of the legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held. At the direction of the commission, guidance on the executive director's discretion in determining substantial public interest in an application has been added by repeating a portion of TWC, §5.554 in new clause (ii). New paragraph (3) defines "substantial public interest" in terms of a local governmental entity with jurisdiction over the location at which the facility is located or proposed to be located by formal resolution of the entity's governing body; a council of governments with jurisdiction over the location at which the facility is located or proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board; a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is located or proposed to be located; or a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is located or proposed to be located.

New §39.651(e)(4) separates the statements that a public meeting is not a contested case proceeding and that a public meeting held as part of a local review committee process meets the requirements of this subsection if public notice is provided, similar to the separation of these statements in §39.501(e)(4) and §39.503(e)(5). Existing paragraphs (2) and (3) are renumbered as paragraphs (5) and (6).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules are not subject to §2001.0225, because they do not meet the criteria for a "major environmental rule" as defined in that statute.

A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of the rules is to make public meetings on applications for new, major amendments, or Class 3 modifications for hazardous waste management facilities or new municipal solid waste management facilities discretionary. It is not anticipated that the rules will adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state

or a sector of the state. The commission concludes that these rules do not meet the definition of a major environmental rule.

Furthermore, even if the rules did meet the definition of a major environmental rule, the rules are not subject to Texas Government Code, §2001.0225, because they do not meet any of the four applicable requirements specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the rules do not meet any of these requirements. First, the applicable federal standard calls for discretionary public meetings if there is a significant degree of public interest in a draft permit (40 Code of Federal Regulations §124.12(a)). Second, the rules do not exceed an express requirement of state law in Texas Health and Safety Code, §§361.0666(a), 361.0791(a) and (b), and 361.082(d), as amended by HB 1609. Third, there is no delegation agreement that would be exceeded by the rules. Fourth, the commission adopts these rules under the specific authority of Texas Health and Safety Code, §§361.0666(a), 361.0791(a) and (b), and 361.082(d). These rules are also adopted under the authority of Texas Health and Safety Code, §§361.011, 361.017, and 361.024, which provide the commission the authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act. Therefore, the commission does not adopt these rules solely under the commission's general powers.

The commission invited public comment on the draft regulatory impact analysis determination. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed a preliminary assessment of whether the rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the rules is to make public meetings for solid waste applications discretionary. The rules would substantially advance this stated purpose by making public meetings on solid waste applications subject to the same discretionary standards used for other waste programs.

Promulgation and enforcement of these rules would be neither a statutory nor a constitutional taking of private real property because the rules do not affect real property. These rules exercise commission jurisdiction over public meetings for municipal solid waste and hazardous waste applications.

There are no burdens imposed on private real property, and the benefits to society are more efficient use of agency staff resources in avoiding public meetings where no one from the public attends. In addition, the rules do not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, these rules will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

The proposed rules were published for comment in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2403). No public hearing was held. The comment period closed April 24, 2006. A comment was received from the appointed representative from Red River County on the Solid Waste Advisory Committee of the Ark-Tex Council of Governments.

RESPONSE TO COMMENTS

Comment

The representative from Red River County commented that by making the public meeting requirement discretionary, no public meetings would occur. He asked that "shall" be preserved in the rule.

Response

The commission disagrees with this comment. The executive director's discretion is restricted by §55.154 that requires the executive director or the Office of Public Assistance to hold a public meeting if the executive director determines that there is a substantial or significant degree of public interest in an application or if a member of the legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held. In addition, new language defines "substantial public interest" in terms of a local governmental entity with jurisdiction over the location at which the facility is located or proposed to be located by formal resolution of the entity's governing body; a council of governments with jurisdiction over the location at which the facility is located or proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board; a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is located or proposed to be located; or a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is located or proposed to be located.

No changes to the proposed rule were made in response to comments.

SUBCHAPTER I. PUBLIC NOTICE OF SOLID WASTE APPLICATIONS

30 TAC §39.501, §39.503

STATUTORY AUTHORITY

The amendments are adopted under Texas Health and Safety Code, §§361.0666, 361.0791, and 361.082, as amended by HB 1609, which makes public meetings on solid waste applications discretionary; §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; §361.017, which establishes the commission's jurisdiction over all aspects of the management of industrial solid waste and hazardous municipal waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; and §361.024, which provides the commission with rulemaking authority.

The adopted amendments implement HB 1609, which amended Texas Health and Safety Code, §§361.0666, 361.0791, and 361.082.

§39.501. Application for Municipal Solid Waste Permit.

(a) Applicability. This section applies to applications for municipal solid waste permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication local review committee process. If an applicant for a municipal solid waste permit decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant shall submit to the executive director a notice of intent to file an application, setting forth the proposed location and type of facility. The executive director shall mail notice to the county judge of the county in which the facility is to be located. If the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice must also be mailed to the mayor of the municipality. The executive director shall also mail notice to the appropriate regional solid waste planning agency or council of government. The mailing must be by certified mail.

(c) Notice of Receipt of Application and Intent to Obtain a Permit.

(1) Upon the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete:

(A) notice must be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit) and, if a newspaper is not published in the county, then the applicant shall publish notice in a newspaper of circulation in the immediate vicinity in which the facility is located or proposed to be located. This notice must contain the text as required by §39.411(b)(1) - (9), (11), and (12) of this title (relating to Text of Public Notice);

(B) the chief clerk shall publish Notice of Receipt of Application and Intent to Obtain Permit in the *Texas Register*; and

(C) the executive director or chief clerk shall mail the Notice of Receipt of Application and Intent to Obtain Permit, along with a copy of the application or summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located, and to the county judge and the health authority of the county in which the facility is located.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) must be published once as required by §39.405(f)(2) of this title (relating to General Notice Provisions). The notice must be published after the chief clerk has mailed the Notice of Application and Preliminary Decision to the applicant. The notice must contain the text as required by §39.411(c)(1) - (6) of this title.

(e) Notice of public meeting.

(1) If an application for a new facility is filed before September 1, 2005:

(A) the agency shall hold a public meeting in the county in which the facility is proposed to be located to receive public comment concerning the application; and

(B) the applicant shall hold a public meeting in the county in which the facility is proposed to be located. This meeting must be held before the 45th day after the date the application is filed.

(2) If an application for a new facility is filed on or after September 1, 2005:

(A) the agency:

(i) may hold a public meeting under §55.154 of this title (relating to Public Meetings) in the county in which the facility is proposed to be located to receive public comment concerning the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is proposed to be located to receive public comment concerning the application:

(I) on the request of a member of the legislature who represents the general area in which the facility is proposed to be located; or

(II) if the executive director determines that there is substantial public interest in the proposed facility; and

(B) the applicant may hold a public meeting in the county in which the facility is proposed to be located.

(3) For purposes of this subsection, "substantial public interest" is demonstrated if a request for a public meeting is filed by:

(A) a local governmental entity with jurisdiction over the location at which the facility is proposed to be located by formal resolution of the entity's governing body;

(B) a council of governments with jurisdiction over the location at which the facility is proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board;

(C) a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is proposed to be located; or

(D) a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is proposed to be located.

(4) A public meeting is not a contested case proceeding under the Administrative Procedure Act. A public meeting held as part of a local review committee process under subsection (b) of this section meets the requirements of paragraph (1)(A) or (2)(A) of this subsection if public notice is provided under this subsection.

(5) The applicant shall publish notice of any public meeting under this subsection, in accordance with §39.405(f)(2) of this title, once each week during the three weeks preceding a public meeting. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters). For public meetings under paragraph (1)(B) or (2)(B) of this subsection, the notice of public meeting is not subject to §39.411(d) of this title, but instead must contain at least the following information:

(A) permit application number;

(B) applicant's name;

(C) proposed location of the facility;

(D) location and availability of copies of the application;

(E) location, date, and time of the public meeting; and

(F) name, address, and telephone number of the contact person for the applicant from whom interested persons may obtain further information.

(6) For public meetings held by the agency under paragraph (1)(A) or (2)(A) of this subsection, the chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice).

(f) Notice of hearing.

(1) This subsection applies if an application is referred to the State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) The applicant shall publish notice at least once under §39.405(f)(2) of this title.

(3) Mailed notice.

(A) If the applicant proposes a new facility, the applicant shall mail notice of the hearing to each residential or business address located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice must be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the hearing. Within 30 days after the date of mailing, the applicant shall file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(B) If the applicant proposes to amend a permit, the chief clerk shall mail notice to the persons listed in §39.413 of this title.

(4) Notice under paragraphs (2) and (3)(B) of this subsection must be completed at least 30 days before the hearing.

§39.503. Application for Industrial or Hazardous Waste Facility Permit.

(a) Applicability. This section applies to applications for industrial or hazardous waste facility permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication requirements.

(1) If an applicant for an industrial or hazardous waste facility permit decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant shall submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. If the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice must also be mailed to the mayor of the municipality. Mailed notice must be by certified mail. When the applicant submits the notice of intent to the executive director, the applicant shall publish notice of the submission in a paper of general circulation in the county in which the facility is to be located.

(2) The requirements of this paragraph are set forth in 40 Code of Federal Regulations (CFR) §124.31(b) - (d), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, (60 FR 63417) and apply to all hazardous waste part B applications for initial permits for hazardous waste management units, hazardous waste part B permit applications for major amendments, and hazardous waste part B applications for renewal of permits, where the renewal application is proposing a significant change in facility operations. For the purposes of this paragraph, a "significant change" is any change that would qualify as a Class 3 permit modification under §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). The requirements of this paragraph do not apply to an application for minor amendment under §305.62 of this title (relating to Amendment), correction under §50.45 of this title (relating to Corrections to Permits), or modification under §305.69 of this title, or to an application that is submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility, unless the application is also for an initial permit for hazardous waste management unit(s), or the application is also for renewal of the permit, where the renewal application is proposing a significant change in facility operations.

(c) Notice of Receipt of Application and Intent to Obtain Permit.

(1) Upon the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located and to the persons listed in §39.413 of this title (relating to Mailed Notice). For all hazardous waste part B applications for initial permits for hazardous waste management units, hazardous waste part B permit applications for major amendments, and hazardous waste part B applications for renewal of permits, the chief clerk shall provide notice to meet the requirements of this subsection and 40 CFR §124.32(b), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, (60 FR 63417) and the executive director shall meet the requirements of 40 CFR §124.32(c), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, (60 FR 63417). The requirements of this paragraph relating to 40 CFR §124.32(b) and (c) do not apply to an application for minor amendment under §305.62 of this title, correction under §50.45 of this title, or modification under §305.69 of this title, or to an application that is submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility, unless the application is also for an initial permit for hazardous waste management unit(s), or the application is also for renewal of the permit.

(2) After the executive director determines that the application is administratively complete:

(A) notice must be given as required by §39.418 of this title (relating to Receipt of Application and Intent to Obtain Permit). Notice under §39.418 of this title will satisfy the notice of receipt of application required by §281.17(d) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness); and

(B) the executive director or chief clerk shall mail notice of this determination along with a copy of the application or summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located, and to the county judge and the health authority of the county in which the facility is located.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) must be published once as required by §39.405(f)(2) of this title (relating to General Notice Provisions). In addition to the requirements of §39.405(h) and §39.419 of this title, the following requirements apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in each county that is adjacent or contiguous to each county in which the facility is located. One notice may satisfy the requirements of §39.405(f)(2) of this title and of this subsection, if the newspaper meets the requirements of both rules.

(2) If the application concerns a hazardous waste facility, the applicant shall broadcast notice of the application on one or more local radio stations that broadcast to an area that includes all of the county in which the facility is located. The executive director may require that the broadcasts be made to an area that also includes contiguous counties.

(3) The notice must comply with §39.411 of this title (relating to Text of Public Notice). The deadline for public comments on industrial solid waste applications will be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(e) Notice of public meeting.

(1) If an application for a new hazardous waste facility is filed:

(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is proposed to be located to receive public comment concerning the application; or

(B) on or after September 1, 2005, the agency:

(i) may hold a public meeting under §55.154 of this title (relating to Public Meetings) in the county in which the facility is proposed to be located to receive public comment concerning the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is proposed to be located to receive public comment concerning this application:

(I) on the request of a member of the legislature who represents the general area in which the facility is proposed to be located; or

(II) if the executive director determines that there is substantial public interest in the proposed facility.

(2) If an application for a major amendment to or a Class 3 modification of an existing hazardous waste facility permit is filed:

(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is located to receive public comment concerning the application if a person affected files a request for a public meeting with the chief clerk concerning the application before the deadline to file public comment or hearing requests; or

(B) on or after September 1, 2005, the agency:

(i) may hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment concerning the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment concerning the application:

(I) on the request of a member of the legislature who represents the general area in which the facility is located; or

(II) if the executive director determines that there is substantial public interest in the facility.

(3) For purposes of this subsection, "substantial public interest" is demonstrated if a request for a public meeting is filed by:

(A) a local governmental entity with jurisdiction over the location at which the facility is located or proposed to be located by formal resolution of the entity's governing body;

(B) a council of governments with jurisdiction over the location at which the facility is located or proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board;

(C) a homeowners(or property owners(association formally organized or chartered and having at least ten members located in the general area in which the facility is located or proposed to be located; or

(D) a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is located or proposed to be located.

(4) If an application for a new industrial or hazardous waste facility that would accept municipal solid waste is filed:

(A) before September 1, 2005, the applicant shall hold a public meeting in the county in which the facility is proposed to be located. This meeting must be held before the 45th day after the date the application is filed; or

(B) on or after September 1, 2005, the applicant may hold a public meeting in the county in which the facility is proposed to be located.

(5) A public meeting is not a contested case proceeding under the Administrative Procedure Act. A public meeting held as part of a local review committee process under subsection (b) of this section meets the requirements of paragraph (1) or (2) of this subsection if public notice is provided under this subsection.

(6) The applicant shall publish notice of any public meeting under this subsection, in accordance with §39.405(f)(2) of this title, once each week during the three weeks preceding a public meeting. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters). For public meetings under paragraph (3) of this subsection, the notice of public meeting is not subject to §39.411(d) of this title, but instead must contain at least the following information:

(A) permit application number;

(B) applicant's name;

(C) proposed location of the facility;

(D) location and availability of copies of the application;

(E) location, date, and time of the public meeting; and

(F) name, address, and telephone number of the contact person for the applicant from whom interested persons may obtain further information.

(7) For public meetings held by the agency under paragraph (1) or (2) of this subsection, the chief clerk shall mail notice to the persons listed in §39.413 of this title.

(f) Notice of hearing.

(1) Applicability. This subsection applies if an application is referred to the State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (concerning Contested Case Hearings).

(2) Newspaper notice.

(A) The applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area that is adjacent or contiguous to each county in which the proposed facility is located.

(B) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) or have a total size of at least nine column inches (18 square inches). The text of the notice must include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice must be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The chief clerk shall mail notice to the persons listed in §39.413 of this title, except that the chief clerk shall not mail notice to the persons listed in paragraph (1) of that section. The notice must be mailed no more than 45 days and no less than 30 days before the hearing. Within 30 days after the date of mailing, the applicant shall file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(B) If the applicant proposes to amend or renew an existing permit, the chief clerk shall mail notice to the persons listed in §39.413 of this title.

(4) Radio broadcast. If the application concerns a hazardous waste facility, the applicant shall broadcast notice of the hearing under subsection (d)(2) of this section.

(5) Deadline. Notice under paragraphs (2)(A), (3), and (4) of this subsection must be completed at least 30 days before the hearing.

(g) Injection wells. This section does not apply to applications for an injection well permit.

(h) Information repository. The requirements of 40 CFR §124.33(b) - (f), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, (60 FR 63417) apply to all applications for hazardous waste permits.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603520

Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 19, 2006
Proposal publication date: March 24, 2006
For further information, please call: (512) 239-5017

♦ ♦ ♦

SUBCHAPTER L. PUBLIC NOTICE OF INJECTION WELL AND OTHER SPECIFIC APPLICATIONS

30 TAC §39.651

STATUTORY AUTHORITY

The amendment is adopted under Texas Health and Safety Code, §§361.0666, 361.0791, and 361.082, as amended by HB 1609, which makes public meetings on solid waste applications discretionary; §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; §361.017, which establishes the commission's jurisdiction over all aspects of the management of industrial solid waste and hazardous municipal waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; and §361.024, which provides the commission with rulemaking authority.

The adopted amendment implements HB 1609, which amended Texas Health and Safety Code, §§361.0666, 361.0791, and 361.082.

§39.651. Application for Injection Well Permit.

(a) Applicability. This subchapter applies to applications for injection well permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication local review committee process. If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant shall submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. In addition, if the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice must be mailed to the mayor of the municipality.

(c) Notice of Receipt of Application and Intent to Obtain Permit.

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete, notice must be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain a Permit). This notice must contain the text as required by §39.411(b)(1) - (9) and (12) of this title (relating to Text of Public Notice). Notice under §39.418 of this title will satisfy the notice of receipt of application required by §281.17(d) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness).

(3) After the executive director determines that the application is administratively complete, in addition to the requirements of §39.418 of this title, notice must be given to the School Land Board, if the application will affect lands dedicated to the permanent school fund. The notice must be in the form required by Texas Water Code, §5.115(c).

(4) For notice of receipt of application and intent to obtain a permit concerning Class I underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility; and

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located.

(5) The chief clerk or executive director shall also mail a copy of the application or a summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located and to the county judge and the health authority of the county in which the facility is located.

(6) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) must be published once under §39.405(f)(2) of this title (relating to General Notice Provisions) after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(c)(1) - (6) of this title. In addition to the requirements of §39.405(h) and §39.419 of this title, the following requirements apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in each county that is adjacent or contiguous to each county in which the proposed facility is located. One notice may satisfy the requirements of §39.405(f)(2) of this title and of this subsection, if the newspaper meets the requirements of both rules.

(2) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice) and to local governments located in the county of the facility. "Local governments" have the meaning as defined in Texas Water Code, Chapter 26.

(4) For Notice of Application and Preliminary Decision concerning Class I underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility; and

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located.

(5) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title (relating to Application for Industrial or Hazardous Waste Facility Permit).

(6) The deadline for public comments on industrial solid waste applications will be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(e) Notice of public meeting.

(1) If an application for a new hazardous waste facility is filed:

(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is proposed to be located to receive public comment concerning the application; or

(B) on or after September 1, 2005, the agency:

(i) may hold a public meeting under §55.154 of this title (relating to Public Meetings) in the county in which the facility is proposed to be located to receive public comment concerning the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is proposed to be located to receive public comment concerning the application:

(I) on the request of a member of the legislature who represents the general area in which the facility is proposed to be located; or

(II) if the executive director determines that there is substantial public interest in the proposed facility.

(2) If an application for a major amendment to or a Class 3 modification of an existing hazardous waste facility permit is filed:

(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is located to receive public comment on the application if a person affected files with the chief clerk a request for a public meeting concerning the application before the deadline to file public comment or to file requests for reconsideration or hearing; or

(B) on or after September 1, 2005, the agency:

(i) may hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment on the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment concerning the application:

(I) on the request of a member of the legislature who represents the general area in which the facility is located; or

(II) if the executive director determines that there is substantial public interest in the facility.

(3) For purposes of this subsection, "substantial public interest" is demonstrated if a request for a public meeting is filed by:

(A) a local governmental entity with jurisdiction over the location in which the facility is located or proposed to be located by formal resolution of the entity's governing body;

(B) a council of governments with jurisdiction over the location in which the facility is located or proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board;

(C) a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is located or proposed to be located; or

(D) a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is located or proposed to be located.

(4) A public meeting is not a contested case proceeding under the Administrative Procedure Act. A public meeting held as part of a local review committee process under subsection (a) of this section meets the requirements of this subsection if public notice is provided in accordance with this subsection.

(5) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters).

(6) The chief clerk shall mail notice to the persons listed in §39.413 of this title.

(f) Notice of contested case hearing.

(1) Applicability. This subsection applies if an application is referred to the State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Newspaper notice.

(A) If the application concerns a facility other than a hazardous waste facility, the applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area that is adjacent or contiguous to each county in which the proposed facility is located.

(B) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(C) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters). The notice must appear in the section of the newspaper containing state or local news items. The text of the notice must include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) For all applications concerning underground injection wells, the chief clerk shall mail notice to persons listed in §39.413 of this title.

(B) For notice of hearings concerning Class I underground injection wells, the chief clerk shall also mail notice to:

(i) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(ii) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(iii) persons who own mineral rights underlying the existing or proposed injection well facility; and

(iv) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located.

(C) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address, not listed under subparagraph (A) of this paragraph, located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice must be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the contested case hearing. Within 30 days after the date of mailing, the applicant shall file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(4) Radio broadcast. If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title.

(5) Deadline. Notice under paragraphs (2)(A), (3), and (4) of this subsection must be completed at least 30 days before the contested case hearing.

(g) Approval. All published notices required by this section must be in a form approved by the executive director prior to publication.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603521
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 19, 2006
Proposal publication date: March 24, 2006
For further information, please call: (512) 239-5017

♦ ♦ ♦

CHAPTER 111. CONTROL OF AIR POLLUTION FROM VISIBLE EMISSIONS AND PARTICULATE MATTER

SUBCHAPTER B. OUTDOOR BURNING

30 TAC §111.203, §111.209

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §111.203 and §111.209. Section 111.209 is adopted *with change* to the proposed text as published in the February 10, 2006, issue of the *Texas Register* (31 TexReg 819). Section 111.203 is adopted *without change* to the proposed text and the text will not be republished.

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

House Bill (HB) 39, 79th Legislature, 2005, amended Texas Health and Safety Code (THSC), §382.018, Outdoor Burning of Waste and Combustible Material, by making it subject to Local Government Code, §352.082, Outdoor Burning of Household Refuse in Certain Residential Areas. Under Local Government Code, §352.082, a person commits a Class C misdemeanor if the person intentionally or knowingly burns household refuse outdoors on a lot that is located in a neighborhood or on a lot that is smaller than five acres. Local Government Code, §352.082, is applicable only to the unincorporated area of a county that is adjacent to a county with a population of 3.3 million or more, in which a planned community is located that has 20,000 or more acres of land that was originally established under the Urban Growth and New Community Development Act of 1970 (42 United States Code, §§4501 *et seq*.) and that is subject to restrictive covenants containing ad valorem or annual variable budget-based assessments on real property. The adopted rules will prohibit the burning of household refuse in the area delineated by Local Government Code, §352.082.

Senate Bill (SB) 1710, 79th Legislature, 2005, also amended THSC, §382.018, by adding subsections (b) and (c), which require the commission to authorize by rule the burning of waste consisting of plant growth in areas that meet the national ambient air quality standards (NAAQS) and do not contain any part of a city that does not meet the NAAQS if the waste is burned on the property of origin and by the owner of the property or any other person authorized by the owner. The commission is prohibited from requiring prior commission approval of the burning, or from authorizing the burning only when no practical alternative exists. Current rules do not make a distinction between attainment and nonattainment areas regarding outdoor disposal fires. The adopted rules will implement the authorization by rule required by THSC, §382.018.

SB 1710 also amended THSC, §382.018, by adding subsections (d) and (e), which prohibit the commission from controlling or prohibiting outdoor burning of waste consisting of plant growth at a site designated for burning of waste generated from specific residential properties located outside of a municipality and in a county with a population of less than 50,000, if supervised by a fire department employee acting in the scope of the person's employment. The current rules do not authorize the burning of waste at designated sites. The adopted rules will establish minimal compliance determination criteria to ensure that all activities meet the qualifications for burns at designated sites. The commission notes that only three counties, Chambers, Hardin, and Rockwall, are within designated nonattainment areas and have a population of less than 50,000. Burning of domestic waste, including plant growth, is already authorized in these counties for private residences when collection of domestic waste is not provided or authorized by the local governmental entity having jurisdiction. To the commission's best available knowledge, no residential properties outside of municipalities in these counties are provided with domestic waste collection by the local governmental entity having jurisdiction. Therefore, the adopted rules will not cause an increase in plant growth burning in designated nonattainment areas.

DEMONSTRATING NONINTERFERENCE UNDER FEDERAL CLEAN AIR ACT, SECTION 110(l)

Issue

The commission provides the following information to clarify why the amendments to §111.203 and §111.209 and the Texas SIP, will not negatively impact the status of the state's attainment areas.

The requirement for reasonable notice and public hearing is satisfied through the hearing held on March 7, 2006, and the public comment period, which was held from February 10, 2006, to March 13, 2006. EPA also issued draft guidance on June 8, 2005, "Demonstrating noninterference Under Section 110(l) of the Clean Air Act When Revising a State Implementation Plan." The guidance states (page 6) that ". . .areas have two options available to demonstrate noninterference for the affected pollutant(s)." This document provides detail of the identified existing measures in the rule preamble to show compliance with option (1) of EPA's guidance: Substitution of one measure by another with equivalent or greater emissions reduction/air quality benefits.

Background

In September 1996 (21 TexReg 8505), the commission approved revisions to the Texas outdoor burning regulations by repealing §§111.101, 111.103, 111.105, and 111.107 and adopting §§101.201-101.221, 111.201, 111.203, 111.205, 111.207, 111.209, 111.211, 111.213, 111.215, 111.219 and 111.221. In October 1999 (64 FR 57983), EPA took a direct final action to approve these revisions to the state's outdoor burning regulations as amendments to the SIP. However, EPA received an adverse comment regarding the amendments and, therefore, withdrew the direct final rulemaking in December 1999 (64 FR 70592). EPA is now in the process of reviewing that action.

As this rulemaking is a revision of regulations currently under review and consideration by EPA for inclusion in the Texas SIP, the commission is asking EPA to review these revisions to §111.203 and §111.209 for inclusion in the SIP, concurrently with the previously submitted outdoor burning regulations.

Analysis of Revisions

a) Revision of §111.203 adds the definitions of "Neighborhood" and "Refuse" as repeated from THSC, §343.002. No air control measures have been removed.

b) Revisions to §111.209.

1) Section 111.209 has been made subject to Local Government Code, §352.082, which classifies certain types of outdoor burning as a Class C misdemeanor. This revision is more restrictive than current outdoor burning rules, which do not prohibit outdoor burning in the area specified in amended Local Government Code, §352.082 (Montgomery County). Furthermore, the adoption of this rule revision and/or the SIP has no bearing on the implementation and enforcement of Local Government Code, §352.082. No air control measures have been removed.

2) THSC, §382.018(d) was amended to prohibit the commission from controlling or prohibiting outdoor burning of waste consisting of plant growth generated from specific residential properties on designated sites outside of a municipality and in counties with a population of less than 50,000. THSC, §382.018(d) is self-implementing. To address the statutory amendment, §111.209(5) authorizes outdoor burning at certain sites as designated by the property owner. However, this revision merely consolidates currently authorized outdoor burning, and does not authorize an increase in outdoor burning frequency. Burning waste consisting of plant growth generated from residential properties within the county but outside of municipalities is currently authorized under §111.209(1) as burning of domestic waste. To the commission's best available knowledge, county jurisdictions do not regularly provide domestic waste collection as that service is ordinarily provided by a municipality. The revision provides an option allowing homeowners to consolidate yard waste at a designated site before burning, rather than having many smaller fires throughout the neighborhood. Furthermore, the revision places additional restrictions on outdoor burning at such a designated site than currently exist for burning of domestic waste. Specifically, the revision requires mandatory notice to the commission prior to the burn and requires supervision by a fire department employee who is part of the fire protection personnel, as defined by Texas Government Code, §419.021, that is acting in the scope of that person's employment. The required supervision of a fire department employee for each burn imposes limits on the frequency and number of outdoor burns and, therefore, would not constitute a relaxation of the SIP. No air control measures have been removed.

3) THSC, §382.018(b) was amended to require the commission to authorize by rule the burning of waste consisting of plant growth on the property of origin, if in an area that meets the NAAQS. Section 111.209(4)(B) authorizes the burning of plant growth on the property of origin in most areas of attainment, regardless of the type of activity that produced the waste. Current rules authorize the burning of waste plant growth on the property of origin, but limit activities to right-of-way maintenance, landclearing operations, and maintenance along water canals, and only when no practical alternative to burning exists.

However, most activities that generate plant waste are the result of right-of-way maintenance, landclearing operations, maintenance along water canals, or domestic activities. Plant waste generated from all of these activities is currently authorized. Therefore, no restriction on the type of activity for which waste plant growth may be burned has been removed.

THSC, §382.018(c) was amended to prohibit rules adopted under THSC, §382.018(b) from 1) requiring prior approval of the burn; and 2) authorizing the burning only when no practical alternative to burning exists. The removal of the requirement to burn only when no practical alternative to burning exists does not constitute the removal of a practical or effective air control measure. In response to comments during the 1996 rulemaking (21 Tex Reg 8509), the commission stated that "The commission's intent. . .is to foster an analysis of practical alternatives prior to burning." The current rule does not require approval of the practical alternative analysis prior to burning. Once the responsible party has determined that alternatives are not practical, it is unreasonable to dispute the determination due to the broad and vague nature of the definition of practical alternative, per §111.101(4) (formerly §111.101(3)), "An economically, technologically, ecologically, and logistically viable option." TCEQ guidance document RG-049, Appendix D, states that when evaluating these four criteria the standard of judgment should be that of a "reasonable person." Therefore, practical alternative does not constitute an air control measure, but rather a measure to foster an analysis prior to burning, as was the commission's intent. To demonstrate this, there is no record in the commission's compliance database of any Notices of Violation or Enforcement for violation of the practical alternative clause. Actions on record regarding outdoor burning cite the burning of inappropriate material, burning in unauthorized locations, burning under unauthorized conditions (e.g. high winds, inappropriate hours, proximity to receptors, etc.), burning of domestic waste where waste collection is provided, or causing nuisance conditions. This further demonstrates that the appropriate air control measures to ensure noninterference with the Texas SIP are in place. Additionally, the commission stated during the 1996 rulemaking and in RG-049 that "The use of trench burners is a practical alternative under certain circumstances." The use of trench burners has not been demonstrated to significantly increase burning efficiency, but is rather a method used to prevent nuisance conditions. Therefore, the removal of practical alternative does not imply an increase in the quantity of material that may be burned, or an increase in air contaminants resulting from burning.

Finally, the current rule is subject to all of the air control measures in §111.219. The revised rules, for areas in attainment, are subject to the air control measures in §111.219(3), (4), (6), and (7), and subject to any local ordinances that prohibit burning inside the corporate limits of a city or town, consistent with Texas Clean Air Act (TCAA), Chapter 382, Subchapter E, Authority of Local Governments. The revised rules, for areas in nonattainment, maintain all of the air control measures in §111.219.

The commission does not anticipate increased burning or a relaxation of the Texas SIP for those municipalities in areas of attainment. Municipalities in areas of attainment remain subject to the prohibitions on outdoor burning in §111.219(3), (4), (6), and (7), which list prohibited burn materials, specify appropriate weather conditions, and prohibit causing adverse effects to any thoroughfares or off-site sensitive receptors. The adopted rules will confer control of allowable outdoor burning to local authorities but require that ordinances prohibiting or regulating outdoor burning comply with the TCAA, Chapter 382, Subchapter E, Authority of Local Governments. Regardless of whether in areas of attainment or nonattainment, persons conducting outdoor burns remain responsible for any consequences, damages, or injuries resulting from the burning in accordance with §111.221, Responsibility for Consequences of Outdoor Burning.

Conclusion

In addition to the above analysis of the rule, §101.4, General Nuisance, continues to provide a determination for whether an air contaminant release is a nuisance. The commission determined that there are sufficient rules and procedures in place to assure compliance with the Texas SIP, and that sufficient air control measures exist in this rulemaking so as not to constitute a relaxation of the Texas SIP.

SECTION BY SECTION DISCUSSION

Administrative and grammatical changes are adopted throughout the sections to bring the existing rule language into agreement with Texas Register requirements, agency guidelines, and guidance provided in the *Texas Legislative Council Drafting Manual*, November 2004.

The adopted amendment to §111.203, Definitions, adds the definition of "Neighborhood" and "Refuse" and renumbers subse-

quent definitions to accommodate the adopted new definitions. The adopted new definitions are repeated from THSC, §343.002.

The adopted amendment to §111.203 will also update the name "Texas Natural Resource Conservation Commission" to "Texas Commission on Environmental Quality."

The adopted amendment to §111.209, Exception for Disposal Fires, is made subject to Local Government Code, §352.082. The proposed rule repeated Local Government Code, §352.082, in proposed subsection (b). All of adopted §111.209 is instead made subject directly to Local Government Code, §352.082. Local law enforcement will be the primary authority in the enforcement of Local Government Code, §352.082.

The adopted amendment to §111.209 also authorizes, as required by THSC, §382.018(b), the burning of plant growth on the property on which it was generated and by the owner of the property, or any person authorized by the owner, in counties that are not designated as nonattainment and that do not contain any part of a city that is part of a designated nonattainment area, by adding adopted new paragraph (4)(B), proposed as subsection (a)(4)(B). The adopted rule expands the existing options for on-site burning of plant growth in most attainment areas by removing the requirement to consider practical alternatives and by allowing on-site burning of plant growth by all property owners, rather than only for right-of-way maintenance, landclearing operations, and maintenance along waterways. The adopted rule, §111.209(4)(B), is subject to §111.219(3), (4), (6), and (7), and subject to any local ordinances that prohibit burning inside the corporate limits of a city or town, consistent with TCAA, Chapter 382, Subchapter E, Authority of Local Governments.

The adopted paragraph (4) does not expand the existing options for on-site burning of plant growth in nonattainment areas. Paragraph (4)(A), proposed as subsection (a)(4)(A), will continue to authorize burning in nonattainment areas, but only for right-of-way maintenance, landclearing operations, and maintenance along water canals, and only in the absence of a practical alternative. When proposed, subsection (a)(4)(A) covered the entire state. The adopted rule, §111.209(4)(A), is subject to §111.219.

The context of "plant growth" has been expanded in paragraph (4) to match the language used in SB 1710. When proposed, subsection (a)(4)(B) was explicitly subject to authorization by the owner of the property, per the requirement in SB 1710. All burning under adopted paragraph (4) is subject to authorization by the owner of the property. This is to clarify that while the language is required by SB 1710 for burning under paragraph (4)(B), the absence of the language elsewhere does not imply that burning on site without the consent of the property owner is authorized.

To protect human health and safety and environmental receptors, adopted §111.209(4)(B) is made subject to §111.219(3), (4), (6), and (7), relating to General Requirements for Allowable Outdoor Burning. In order to ensure that local authorities retain appropriate authority to enact ordinances controlling outdoor burning, adopted §111.209(4)(B) is made subject to any local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with TCAA, Subchapter E, Authority of Local Governments. The commission also notes that all responsible persons engaged in outdoor burning are subject to §111.221, relating to Responsibility for Consequences of Outdoor Burning.

The adopted amendment to §111.209 also provides for the burning of waste plant growth generated from specific residential properties at designated sites located outside of municipalities and within counties with a population of less than 50,000, by adding adopted new paragraph (5), proposed as subsection (a)(4)(C). Under specific conditions, the commission is prohibited from controlling or prohibiting burning under THSC, §382.018(d). The burn must be at a designated burn site, located outside of a municipality, and within a county with a population of less than 50,000. All material burned must consist of plant growth generated at specific residential properties for which the site is designated. The burn must be supervised by a fire department employee acting in the scope of the person's employment, who must notify the commission of each supervised burn. To determine if burns under adopted paragraph (5) meet the conditions of THSC, §382.018(d), the adopted rule requires the owner of the site or the owner's authorized agent to post the designated site, maintain a description or list of specific residential properties for which the site is designated, ensure that all waste burned consists of plant growth generated from these properties, and to ensure that a qualified fire department employee supervises each burn at the site. The requirement under proposed subsection (a)(4)(C)(iii), now paragraph (5)(C), to include the name of each property owner on the record of designated residential properties has been struck from the adopted rule.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a major environmental rule as defined in the Administrative Procedure Act. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The primary purpose of the adopted rules is to protect the environment through the regulation of the outdoor burning of waste and combustible material. The adopted rules will not have an adverse material impact because the adopted rules are limited to revisions to the prohibition on and exception for disposal fires. The adopted revisions will: 1) prohibit the burning of domestic waste in residential areas that are in unincorporated areas of a county adjacent to a county with a population of 3.3 million or more and where there is a planned community of 20,000 acres or more. In these residential areas, domestic waste cannot be burned in a neighborhood or on a lot that is less than five acres; 2) allow for the burning of waste consisting of plant growth in areas that meet the NAAQS and do not contain any part of a city that does not meet the NAAQS if the waste is burned on the property of origin and by the owner of the property or any other person authorized by the owner; and 3) allow for the outdoor burning of waste consisting of plant growth at a site designated for consolidated burning of waste generated from specific residential properties located outside of a municipality and in a county with a population of less than 50,000, if supervised at the time of the burning by a fire department employee acting in the scope of the person's employment.

Furthermore, the adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a), where the adopted rules: 1) are specifically re-

quired by state law, namely THSC, §382.018; 2) do not exceed the express requirements of THSC, §382.018; 3) do not exceed a requirement of a federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and 4) are not an adoption of a rule solely under the general powers of the commission.

Based on this assessment, the adopted rulemaking does not constitute a major environmental rule and is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225. Public comments were solicited. No public comments were received regarding the regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules and performed an assessment of whether the adopted rules constitute a taking under Texas Government Code, Chapter 2007. The primary purpose of the adopted rules is to protect the environment through the regulation of the outdoor burning of waste.

Promulgation and enforcement of these adopted rules will be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The adopted rules are limited to revisions to the prohibition on and exception for disposal fires. The adopted revisions will: 1) prohibit the burning of domestic waste in residential areas that are in unincorporated areas of a county adjacent to a county with a population of 3.3 million or more and where there is a planned community of 20,000 acres or more. In these residential areas, domestic waste cannot be burned in a neighborhood or on a lot that is less than five acres; 2) allow for the burning of waste consisting of plant growth in areas that meet the NAAQS and do not contain any part of a city that does not meet the NAAQS if the waste is burned on the property of origin and by the owner of the property or any other person authorized by the owner; and 3) allow for the outdoor burning of waste consisting of plant growth at a site designated for consolidated burning of waste generated from specific residential properties located outside of a municipality and in a county with a population of less than 50,000, if supervised at the time of the burning by a fire department employee acting in the scope of the person's employment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the revision is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §33.201 *et seq*., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found that the adopted rulemaking is consistent with the applicable CMP goals and policies.

The CMP goals applicable to the adopted rules include: to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; to ensure and enhance planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone; and to balance these competing interests.

The specific CMP policy applicable to the adopted rules requires that commission rules under THSC, Chapter 382, governing emissions of air pollutants, shall comply with regulations in 40 Code of Federal Regulations, adopted in accordance with Federal Clean Air Act (FCAA), 42 United States Code, §7401, *et seq*., to protect and enhance air quality in the coastal area so as to protect coastal natural resources areas and promote the public health, safety, and welfare.

Promulgation and enforcement of the rules will not violate or exceed any standards identified in the applicable CMP goals and policies. The adopted rules are consistent with these CMP goals and policies. The rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

Public comments were solicited. No public comments were received regarding the consistency with the coastal management program.

PUBLIC COMMENTS

The commission received written comments from four individuals, the City of Lufkin, Brazos River Authority (BRA), TXU Electric Delivery (TXU), Houston Regional Group of the Sierra Club (HSC), Earthmoving Contractors Association of Texas (ECAT), Galveston County Health District (GCHD), and United States Environmental Protection Agency (EPA). A public hearing was held on March 7, 2006. The commission received oral comments from the Texas Illegal Dumping Resource Center (TIDRC), Texas Builder's Association (TBA), and ECAT.

Three individuals were opposed to authorizing landowners to burn within the city limits, while one individual supported burning in the city limits. The City of Lufkin was opposed to restricting burning to one hour after sunrise to one hour before sunset. BRA, TXU, HSC, and TBA generally supported the rulemaking. TIDRC did not oppose the rulemaking but made several suggestions. GCHD did not indicate support or opposition to the rulemaking. ECAT's comments were outside the scope of the rulemaking.

RESPONSE TO COMMENTS

One individual commented that due to her allergies and her husband's emphysema there should be no burning allowed within the city limits. She also commented that she has had to leave her house and seek medical attention as a result of burning in her neighborhood. Two individuals would like to see a statewide ban on burning within a city limit and would like the ban to be enforced.

The commission has undertaken this rulemaking to comply with SB 1710. SB 1710 requires the commission to authorize by rule the burning of plant growth in most attainment areas, if burned on the property of origin. The commission believes the intent of the legislation, in part, is to direct and delegate appropriate authority to local governments in efforts to ensure that regulatory policies address the concerns of affected citizens. In response to the comment, the commission has made §111.209(4)(B) subject to any local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent the TCAA, Chapter 382, Subchapter E, Authority of Local Governments. This will allow each affected municipality to determine and address the

concerns of affected citizens. Allowable outdoor burning is not permitted at any time to rise to a level of nuisance conditions. Anyone may report a nuisance condition to the commission and file a complaint by calling 1-888-777-3186.

One individual commented that she is concerned that her current practice of burning leaves in her yard at her residence in the city limits will be prohibited or limited under the proposed amendments to outdoor burning in 30 TAC Chapter 111.

Under current rules, there is no provision allowing a person to burn yard waste on site where waste collection is provided by the local entity having authority. Under the adopted rule, however, this type of burning will be authorized even when waste collection is provided. As noted in the response to the previous comment, this authority is subject to any local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with TCAA, Chapter 382, Subchapter E, Authority of Local Governments. This will allow each affected municipality to determine and address the concerns of affected citizens. The commission believes city governments should be allowed to control burning within their limits at the local level. No change has been made in response to the comment.

The City of Lufkin commented that §111.219(6)(A) was too restrictive and that the requirement to begin burning no earlier than one hour after sunrise and to have the burn completed no later than one hour before sunset should be changed. The city commented that the winds are generally calmer and the humidity higher early in the morning and later in the evening which would reduce the possibility for the burn to get out of control.

The commission agrees that in many instances the meteorological conditions early in the morning and late in the evening may reduce the risk of an out of control burn. The requirements of §111.219 are intended to improve the dispersion conditions necessary to reduce the potential impacts of smoke and related emissions from burns subject to the requirements of this section. No change to the rule has been made.

BRA commented that overall it supported the rule changes; however, it expressed concern that the requirement under proposed §111.209(a)(4)(C)(i) and §111.209(a)(4)(C)(vi) that the burning be "directly supervised by an employee of a fire department who is part of the fire protection personnel, as defined by Local Government Code, §419.021, and is acting in the scope of the person's employment," was too restrictive. BRA commented that this requirement "does not recognize the considerable skill and training that volunteer firefighters have in fighting brush fires, grass fires and wildfires," and "in contrast to the vast wildfire experience of volunteer firefighters, most municipal firefighter's training focuses primarily on structural firefighting." BRA was concerned that this requirement eliminates most of rural Texas, where local governments rely solely upon volunteer fire departments for fire protection, from taking advantage of the revised outdoor burning rules.

The commission recognizes the considerable skill and training that volunteer firefighters have in fighting brush fires, grass fires, and wildfires. However, the commission has undertaken this rulemaking to comply with SB 1710. SB 1710 is specific in its requirement that the burning be "directly supervised by an employee of a fire department who is part of the fire protection personnel, as defined by Local Government Code, §419.021, and is acting in the scope of the person's employment." No change to the rule has been made in response to the comment.

TXU commented that it supported the rule as proposed and emphasized the importance of two sections contained in the proposed rule: 1) TXU supports the additional flexibility in specific circumstances and/or operations that the applicability of §111.209(a)(4)(A) and §111.209(a)(4)(B) provides for "on-site burning" for "right-of-way (ROW) management." Section 111.209(a)(4)(A) and §111.209(a)(4)(B) of the proposed rule allows outdoor burning regardless of whether a practical alternative to burning exists. The ability to conduct outdoor burning without having to provide evidence of practical alternatives would greatly expedite cleanup and management of ROW. For example, Hurricanes Katrina and Rita resulted in large amounts of wood and brush, some in remote areas inaccessible by most vehicles; and 2) TXU supports allowing a "contractual easement document" to be acceptable documentation that an individual or company is an "authorized agent," and supports the inclusion of an "authorized agent" in §111.209(a)(4)(B). TXU may not be the actual property owner, but may have a contractual easement agreement with the owner to maintain the ROW.

Proposed §111.209(a)(4)(A) and §111.209(a)(4)(B) were intended to be two separate authorizations, i.e., a person would have to choose whether he intended to burn under subparagraph (A) or (B), but could not pick and choose from both. Subparagraph (A) was intended to apply statewide but only to the listed activities (i.e., ROW, landclearing, maintenance along water canals), and only when no practical alternative to burning exists. Subparagraph (B) was intended to apply only in certain areas of the state, but for all activities including, but not limited to, ROW, landclearing, and maintenance along water canals, and only by the landowner or any person authorized by the landowner. Under proposed subparagraph (A), burning for ROW in nonattainment areas would be permitted, as long as no practical alternatives existed. Under proposed subparagraph (B), burning for ROW would be permitted, but only with landowner authorization.

In response to TXU's first point, the commission has made the authorizations under subparagraphs (A) and (B) mutually exclusive. Subparagraph (A) applies only in a county that is part of a designated nonattainment area or that contains any part of a municipality that extends into a designated nonattainment area. Subparagraph (B) applies in all other areas. Under subparagraph (A), only the listed activities are authorized and practical alternatives must be considered. Subparagraph (B) includes, but is not limited to, the listed activities and consideration of practical alternatives is not required. Burning under either subparagraph (A) or subparagraph (B) is restricted to plant growth generated on the property on which it is burned.

In response to TXU's second point, the proposed rule did not contain language allowing a "contractual easement document" to be acceptable documentation that an individual or company is an "authorized agent." SB 1710 is specific in that the burning must be by the property owner or any other person authorized by the owner. The commission authorizes burning of plant growth, but does not authorize the infringement of the property rights of landowners. Whether or not a "contractual easement document" is acceptable documentation that an individual or company is authorized by the landowner to burn plant growth is a matter between the parties to the document. The adopted rule makes both subparagraphs (A) and (B) subject to the requirement that burning must be by the property owner or any other person authorized by the owner.

HSC commented that it supported the rule change that makes the burning of household waste a Class C misdemeanor. Unfortunately, HSC commented, the way HB 39 is worded, TCEQ must apply this rule only to areas near The Woodlands. Therefore, other areas will not receive commensurate protection.

HB 39 created a Class C misdemeanor in Local Government Code, Chapter 352. The commission has undertaken this rulemaking, as it relates to HB 39, to ensure that the exceptions for disposal fires contained in §111.209 are consistent with the new criminal statute. No change to the rule has been made in response to the comment.

HSC commented that it does not support the implementation of the language in SB 1710 which prohibits the commission from requiring prior approval for outdoor burning under the proposed rules. HSC commented that approval by the TCEQ of outdoor burning provides public protection and information.

The commission has undertaken this rulemaking to comply with SB 1710. SB 1710 is specific in its requirement that the commission cannot require prior commission approval. No change to the rule has been made in response to the comment.

HSC commented that the phrase "plant growth" is not defined in §111.203 and the TCEQ should "strictly define this phase so that there are no unintended legal surprises when the rule is tested in court."

The commission has expanded the context of the term "plant growth" to include "trees, brush, grass, leaves, branch trimmings, or other plant growth," and believes the meaning is clear from the expanded context. The term has not been strictly defined in 30 TAC §101.203.

HSC commented that it supported the requirements under §111.209(a)(4)(C)(i)-(vi), as reasonable things for an owner of a designated site or the owner's agent to do.

The commission appreciates the comment. No change to the rule has been made in response to the comment.

TBA commented that it supported the proposed rules. It pointed out four issues which it stated probably do not affect the substance of the rule but may help eliminate ambiguities.

In §111.209(a)(4), the proposed rule uses the language "brush, trees, and other plant growth." Using the language "brush, trees, grass, leaves, branch trimmings, or other plant growth" would expand the language a little and be consistent with the language used in SB 1710, and in proposed §111.209(a)(4)(C)(i).

The commission agrees that using the language "brush, trees, grass, leaves, branch trimmings, or other plant growth" would expand the language and be consistent with the language used in SB 1710. The language has been revised as recommended.

TBA commented that in §111.209(a)(4)(B), the proposed rule uses the language "In a county that is not part of {a} designated nonattainment area." TBA recommends using the language "In an area," rather than, "In a county." The statute uses the word "area" rather than "county." "County" could be ambiguous; does it mean both the incorporated and the unincorporated areas of the county? Or does it mean the unincorporated areas only? TBA prefers that the language "municipality that extends into a designated nonattainment area," read "municipality that is designated nonattainment area." TBA believes this may not be substantive but might help clarify the rule.

The commission believes that the term "county" represents the only comprehensive set of legally defined areas in Texas. Furthermore, nonattainment areas are designated along county lines. No change has been made in response to the comment.

The commission believes that the language "in a county that is not part of a designated nonattainment area and that does not contain any part of a municipality that extends into a designated nonattainment area" is necessary to concisely define the counties in which proposed §111.209(a)(4)(B) is not applicable. The rule is not applicable in two types of counties: 1) all counties in designated nonattainment areas; and 2) counties in attainment areas that both border a nonattainment county and in which a municipality extends across the county line into both the attainment and nonattainment areas. No change has been made in response to this comment.

TBA commented that in §111.209(a)(4)(B), the proposed rule is subject to the requirements of §111.219(3), (4), (6), and (7). TBA believes paragraph (7) may be redundant. Paragraph (7) talks about burning oil, non-wood construction items, and similar things. The rule itself does not contemplate the burning of things like oil or non-wood construction materials.

While the commission acknowledges that proposed §111.209(a)(4)(B) does not contemplate the burning of items such as those prohibited in §111.219(7), the commission believes that making §111.209 subject to §111.219(7), emphasizes the necessity and importance of complying with the general restriction. No change has been made in response to the comment.

TBA commented that in §111.209(a)(4)(C)(iii), the proposed rule requires the owner of a designated site to maintain records of the designated residential properties for which the site is designated. The record must contain the description of a platted subdivision and/or a list of each property address and the name of each property owner. TBA believes the language is confusing. Does it mean you must maintain the description of the platted subdivision or a list of each address, and in any event the name of each property owner? Or does it mean you must maintain the description or both the address and name of each property owner? TBA suggests the requirement to maintain the name of each property owner may not be necessary and that removing it would eliminate the confusion. The owner of the designated site may not have the name of the residential property owner, but if he has the description of the subdivision and the address of each property, then he knows the locations designated for the site.

The commission agrees that the requirement to include the name of each property owner may be an unnecessary restriction and may be the cause of confusion. The requirement has been struck from the rule.

TIDRC commented that while HB 39 created a Class C misdemeanor, located under Local Government Code, §352.052, the commission created a crime with a larger penalty under Texas Water Code, §7.177(a)(5), by restating this prohibition against outdoor burning in proposed §111.209(b).

The commission has undertaken this rulemaking as it relates to HB 39 to ensure that the exceptions for disposal fires contained in §111.209 are consistent with the new criminal statute located in Local Government Code, Chapter 352. TIDRC is correct that under Texas Water Code, §7.177(a)(5), an intentional or knowing violation of commission rules adopted under THSC, Chapter 382, carries penalties of up to $50,000 for an individual and up to 180 days confinement. The commission has made

§111.209 subject directly to Local Government Code, §352.052, rather than repeating the restriction in proposed §111.209(b). This will provide notice of this new criminal statute without creating a larger penalty than HB 39 intended.

TIDRC commented that SB 1710 specifically refers to areas that meet the NAAQS, but proposed §111.209(a)(4)(B), uses language that would have the rule change apply everywhere except nonattainment areas, which would include the undetermined areas, which constitute most of Texas. This would greatly expand the area that the rule would be applicable to beyond that specified in SB 1710.

The commission concurs that the language in proposed §111.209(a)(4)(B) encompasses most attainment areas, and the language in SB 1710 does not encompass the undetermined areas. However, the language in SB 1710 does not describe an enforceable area. It is possible for an area to meet the NAAQS one day, and fail to meet the NAAQS for a particular pollutant on the next day, depending on atmospheric conditions and pollutant transport from other areas. On the other hand, nonattainment areas are designated and legally defined areas. No change has been made in response to the comment.

TIDRC commented that not all cities have local ordinances to deal with illegal burning. Some of them rely on the criminal application of Texas Water Code, §7.177 to address local burning within the city limits. By removing the criminal penalty for burning of brush and limbs and other plant waste inside the city limit, some cities will have to change their ordinances to ensure that their local policies will criminalize outdoor burning.

The commission concurs that removing the criminal penalty for burning inside the city limit could prove a significant inconvenience to many Texas municipalities. The commission has undertaken this rulemaking to comply with SB 1710. SB 1710 requires the commission to authorize by rule the burning of plant growth in most attainment areas, if burned on the property of origin. The commission believes the intent of the legislation, in part, is to direct and delegate appropriate authority to our local governments in efforts that regulatory policies address the concerns of affected citizens. In response to the comment, the commission has made §111.209(4)(B) subject to any local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with TCAA, Chapter 382, Subchapter E, Authority of Local Governments. This will allow each affected municipality to determine and address the concerns of affected citizens.

GCHD commented that the proposed revisions authorize the burning of plant growth in areas that meet the NAAQS and do not contain any part of a city that does not meet the NAAQS if the waste is burned on the property of origin and by the owner of the property or any other person authorized by the owner. GCHD asked the question, "What about burning of plant material in nonattainment areas on property of origin by the owner of the property or any other person authorized by the owner?"

The adopted rule does not authorize outdoor burning in designated nonattainment areas on the property of origin by the owner or the property or any other person authorized by the owner. No change to the rule has been made in response to the comment.

ECAT commented that it is a statewide organization made up of contractors who specialize in heavy dirt work, with a major portion of their work in the area of agriculture and natural resource conservation type work. ECAT does mechanical brush control as it relates to pasture conditions, and primarily as it relates to increasing and conserving both groundwater and surface water. ECAT has major concerns and interests in how the contractors dispose of the brush in their business. Burning in most of their applications is the only practical method. Therefore, it concerns ECAT when there are discussions at the state environmental agency that could possibly limit, or put unrealistic controls on this best practice. ECAT offers its services in the future to the commission whenever work on rules concerning agricultural burning is considered.

The commission's proposed §111.209(a)(4)(A) and (B) will not prohibit any landclearing activity that is authorized under the current rule. The proposed amendment to the rule would remove the requirement of practical alternative in attainment areas. The commission thanks ECAT for its comments and welcomes suggestions on any future rule proposals concerning agricultural burning.

EPA commented that a comparison of Texas' revisions to §111.203 and §111.209 to current SIP-approved rules (including those currently under EPA consideration) seem to relax outdoor burning in some areas. EPA is concerned that a relaxation on outdoor burning would make it difficult for some areas to remain in attainment due to potential increases in direct emissions of particulate matter and other pollutants such as nitrogen oxides, volatile organic compounds, and sulfur dioxide. EPA stated that the proposal does not show noninterference with any of the Clean Air Act requirements, particularly with regard to FCAA, §110(l). EPA commented that the Texas SIP does not include §111.203 to §111.221, but instead an earlier approved version of rules including §§111.101, 111.103, 111.105, and 111.107. EPA pointed out that the remaining sections not in the SIP are currently under EPA review and have not yet been approved.

EPA suggested that the commission provide an explanation on how the amendments to §111.203 and §111.209, and how §§111.101, 111.103, 111.105, and 111.107 would not interfere with any of the FCAA requirements. EPA also commented that there must be an opportunity for notice and public comment.

The 79th Legislature in 2005 amended THSC, §382.018(a), making it subject to the Local Government Code, §352.082, which classified certain types of outdoor burning, as designated in this rulemaking, as a Class C misdemeanor. 30 TAC §111.209 was amended accordingly to prohibit the burning of household refuse in a limited demographic area. The amendment to §111.209 would be more restrictive than current outdoor burning rules, which do not criminalize or prohibit outdoor burning in the specified area. The commission does not expect any increases in outdoor burning in the specified area and, therefore, this rulemaking would not constitute a relaxation of the Texas SIP. The commission made no changes to §111.209 in response to this comment.

Through the enactment of SB 1710, the 79th Legislature in 2005 amended THSC, §382.018(b) and (d). The current rules under revision (§111.203 and §111.209) require consideration of practical alternatives, incorporate all of the controls in §111.219, and do not make a distinction between areas of attainment and nonattainment. The adopted rules, however, make a distinction between allowable burning in areas of attainment and nonattainment. Section 111.209(4)(A) still incorporates all of the controls in §111.219. Section 111.209(4)(B) is subject to the controls in §111.219(3), (4), (6), and (7), is subject to any local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with TCAA, Chapter 382, Subchapter E,

Authority of Local Governments, and no longer require consideration of practical alternatives.

THSC, §382.018(b) allows burning in areas that meet the NAAQS without requiring prior commission approval or consideration of practical alternatives. During proposal of the regulation, 30 TAC §111.209 was amended to authorize on-site outdoor burning in attainment areas without consideration of practical alternatives and incorporated §111.219(3), (4), (6), and (7). For areas in attainment, §111.209(4)(B) is subject to the controls in §111.219(3), (4), (6), and (7), and is subject to any local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with TCAA, Chapter 382, Subchapter E, Authority of Local Governments. For areas of nonattainment, §111.209(4)(A) is subject to the air control measures in §111.219. Section 111.219 will maintain the necessary controls on outdoor burning in nonattainment areas, such as delineating appropriate burn times, weather conditions, distances from sensitive receptors, prohibitions against burning certain materials, and prohibitions on burns within corporate limits of a city. Areas in attainment will also be subject to the controls in §111.219, with the distinction that controls on allowable outdoor burning within the corporate limits of a city will be delegated to local authorities to enact ordinances consistent with the TCAA. The removal of practical alternatives in areas of attainment was specified by the legislature in the amendments made to THSC, §382.018(b). The removal of practical alternatives in areas of attainment will not constitute a relaxation of the SIP as the consideration was primarily for a demonstration of economic feasibility rather than a control on outdoor burn emissions. Controls on outdoor burn emissions remain in place because they are included in the requirements in §111.219, particularly with regard to areas in nonattainment so as not to constitute a relaxation of the SIP. The commission has adopted regulations to conform with the changes made to the statute without compromising controls on allowable outdoor burning.

THSC, §382.018(d) was amended to allow for outdoor burning of plant growth generated from specific residential properties on designated sites outside of a municipality and in counties with a population less than 50,000. Section 111.209 currently does not allow for burning on designated sites. The amendment to §111.209 for designated sites requires mandatory notice to the commission prior to the burn, and requires supervision by a fire department employee. Only three counties in nonattainment areas meet the requirements for designated site burns (Hardin, Rockwall, and Chambers). The commission anticipates changes to the adopted rule would consolidate currently authorized outdoor burning rather than increasing it. Burning of domestic waste, including plant growth, is already authorized in these counties for private residences when collection of domestic waste is not provided or authorized by the local government having jurisdiction. To the commission's best available knowledge, no residential properties outside of the municipalities in these counties are provided with domestic waste collection by the local government having jurisdiction. The adopted rules are not expected to result in an increase in outdoor burning as the counties that were previously conducting outdoor burns will be permitted to continue doing so, but with the requirement that the burns be conducted on a designated site and conducted within the requirements in §111.209. The additional controls, such as the required presence of a fire department employee supervising each burn, impose limits on the frequency and number of outdoor burns and, therefore, would not relax the SIP. The commission made no changes to the rules in response to this comment.

Through the enactment of HB 39 and SB 1710, the 79th Legislature in 2005, amended THSC, §382.018(a)-(e), and §111.203 and §111.209 were amended accordingly to conform to the statutes. Sections 111.101, 111.103, 111.105, 111.107, 111.205, and 111.207 were not proposed to be amended as HB 39 and SB 1710 did not affect these sections. Additionally, §§111.101, 111.103, 111.105, and 111.107 were repealed on August 21, 1996, and replaced with §§111.201-111.221 (64 FR 57983). The sections under EPA consideration for approval have now been amended (§111.203 and §111.209); therefore, there has only been a SIP revision for these sections and consideration or revisions of other sections in Chapter 111 would be outside the scope of SB 1710 and HB 39. In response, a new section, DEMONSTRATING NONINTERFERENCE UNDER FEDERAL CLEAN AIR ACT, SECTION 110(l), has been incorporated in the rule preamble.

The commission held a stakeholder meeting on September 26, 2005, in Austin and gained input from county and local law enforcement agencies, city governments, land developers, and utility companies. The amendments and public hearing notice were published in the *Texas Register* on February 10, 2006, and the public hearing was held on March 7, 2006, to obtain comment.

STATUTORY AUTHORITY

The amendments are adopted under THSC, §382.002, relating to Policy and Purpose, Texas Clean Air Act (TCAA), §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which provides the commission the authority to develop a comprehensive plan for the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.018, which authorizes the commission to control outdoor burning; and §382.085, which prohibits unauthorized air emissions; and Texas Water Code, §5.103 and §5.105, which authorizes the commission to adopt rules.

The adopted amendments implement THSC, §§382.002, 382.011, 382.017, and 382.018.

§111.209. Exception for Disposal Fires.

Except as provided in Local Government Code, §352.082, outdoor burning is authorized for the following:

(1) domestic waste burning at a property designed for and used exclusively as a private residence, housing not more than three families, when collection of domestic waste is not provided or authorized by the local governmental entity having jurisdiction, and when the waste is generated only from that property. Provision of waste collection refers to collection at the premises where the waste is generated. The term "domestic waste" is defined in §101.1 of this title (relating to Definitions). Wastes normally resulting from the function of life within a residence that can be burned include such things as kitchen garbage, untreated lumber, cardboard boxes, packaging (including plastics and rubber), clothing, grass, leaves, and branch trimmings. Examples of wastes not considered domestic waste that cannot be burned, include such things as tires, non-wood construction debris, furniture, carpet, electrical wire, and appliances;

(2) diseased animal carcass burning when burning is the most effective means of controlling the spread of disease;

(3) veterinarians in accordance with Texas Occupations Code, §801.361, Disposal of Animal Remains;

(4) on-site burning of trees, brush, grass, leaves, branch trimmings, or other plant growth, by the owner of the property or any other person authorized by the owner, and when the material is generated only from that property:

(A) in a county that is part of a designated nonattainment area or that contains any part of a municipality that extends into a designated nonattainment area; if the plant growth was generated as a result of right-of-way maintenance, landclearing operations, and maintenance along water canals when no practical alternative to burning exists. Such burning is subject to the requirements of §111.219 of this title (relating to General Requirements for Allowable Outdoor Burning). Commission notification or approval is not required; or

(B) in a county that is not part of a designated nonattainment area and that does not contain any part of a municipality that extends into a designated nonattainment area; this provision includes, but is not limited to, the burning of plant growth generated as a result of right-of-way maintenance, landclearing operations, and maintenance along water canals. Such burning is subject to local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with the Texas Clean Air Act, Chapter 382, Subchapter E, Authority of Local Governments, and the requirements of §111.219(3), (4), (6), and (7) of this title. Commission notification or approval is not required.

(5) at a site designated for consolidated burning of waste generated from specific residential properties. A designated site must be located outside of a municipality and within a county with a population of less than 50,000. The owner of the designated site or the owner's authorized agent shall:

(A) post at all entrances to the site a placard measuring a minimum of 48 inches in width and 24 inches in height and containing, at a minimum, the words "DESIGNATED BURN SITE - No burning of any material is allowed except for trees, brush, grass, leaves, branch trimmings, or other plant growth generated from specific residential properties for which this site is designated. All burning must be supervised by a fire department employee. For more information call {PHONE NUMBER OF OWNER OR AUTHORIZED AGENT}." The placard(s) must be clearly visible and legible at all times;

(B) designate specific residential properties for consolidated burning at the designated site;

(C) maintain a record of the designated residential properties. The record must contain the description of a platted subdivision and/or a list of each property address. The description must be made available to commission or local air pollution control agency staff within 48 hours, if requested;

(D) ensure that all waste burned at the designated site consists of trees, brush, grass, leaves, branch trimmings, or other plant growth;

(E) ensure that all such waste was generated at specific residential properties for which the site is designated; and

(F) ensure that all burning at the designated site is directly supervised by an employee of a fire department who is part of the fire protection personnel, as defined by Texas Government Code, §419.021, and is acting in the scope of the person's employment. The fire department employee shall notify the appropriate commission regional office with a telephone or electronic facsimile notice 24 hours in advance of any scheduled supervised burn. The commission shall provide the employee with information on practical alternatives to burning. Commission approval is not required;

(6) crop residue burning for agricultural management purposes when no practical alternative exists. Such burning shall be subject to the requirements of §111.219 of this title and structures containing sensitive receptors must not be negatively affected by the burn. When possible, notification of the intent to burn should be made to the appropriate commission regional office prior to the proposed burn. Commission notification or approval is not required. This section is not applicable to crop residue burning covered by an administrative order; and

(7) brush, trees, and other plant growth causing a detrimental public health and safety condition burned by a county or municipal government at a site it owns upon receiving site and burn approval from the executive director. Such a burn can only be authorized when there is no practical alternative, and it may be done no more frequently than once every two months. Such burns cannot be conducted at municipal solid waste landfills unless authorized under §111.215 of this title (relating to Executive Director Approval of Otherwise Prohibited Outdoor Burning), and shall be subject to the requirements of §111.219 of this title.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603522
Robert Martinez
Acting Division Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 19, 2006
Proposal publication date: February 10, 2006
For further information, please call: (512) 239-5017

♦ ♦ ♦

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 13. LAND RESOURCES

The General Land Office (GLO) and the School Land Board (SLB) adopt the repeal of Title 31, Part 1, Chapter 13, Subchapter F, relating to Application to Purchase or Lease Vacant and Unsurveyed Public School Land, §§13.71 - 13.86 of the Texas Administrative Code. The GLO simultaneously adopts new Subchapter F, relating to Vacancy Process, §§13.71 - 13.83 of the Texas Administrative Code, without changes to the text, as published in the May 19, 2006, issue of the *Texas Register* (31 TexReg 4169) and will not be republished. The newly adopted Subchapter F, §§13.71 - 13.83, contains rules governing the administrative procedures for processing and investigation of vacancy applications submitted to the GLO and the terms and conditions for the sale or lease of the vacant land. These rules are adopted pursuant to new legislation that requires the GLO and the SLB to adopt rules governing the administration of the statutes and the terms and conditions for the sale or lease of vacant land in accordance with Tex. Nat. Res. Code §51.174(c).

The GLO adopts the repeal of the existing Subchapter F, relating to Application to Purchase or Lease Vacant and Unsurveyed Public School Land, §§13.71 - 13.86 of the Texas Administrative Code as all application pending before the GLO and actions arising out of vacancy application pending in the courts of the State

of Texas that came within the purview of these rules have been finalized. The statute with which these rules originally correspond has been amended twice, most recently by S.B.1103, 79th Leg., R.S. (2005). Therefore as all applications are finalized and the statute had been amended these rules no longer have force or effect and are no longer necessary.

The GLO adopts the repeal of §13.71 relating to Purpose and Scope; §13.72 relating to Definitions; §13.73 relating to General Provisions/Exclusions; §13.74 Application; §13.75 Filing the Application; §13.76 Establishing Good Faith Status; §13.77 relating to Priority Among Good-Faith Claimants; §13.78 relating to Deposit for Cost of Proceeding on the Application; §13.79 relating to Appointment of Surveyor; §13.80 relating to Notice of Intent to Survey; §13.81 relating to Disqualification of Surveyor; §13.82 relating to Survey Report; §13.83 relating to Exceptions to Survey; §13.84 relating to Additional Surveys; §13.85 relating to Action on Application; and §13.86 Decision Without a Hearing.

The GLO and the SLB adopt the new Subchapter F, relating to Vacancy Process, §13.71 relating to General Provisions; §13.72 relating to Definitions; §13.73 relating to Extension of Deadlines; §13.74 relating to Application Process; §13.75 relating to Exceptions to Application; §13.76 relating to Deposits; §13.77 relating to Disqualification and Removal of Appointed Surveyor; §13.78 relating to Attorney Ad litem; §13.79 relating to Form of Pleadings; §13.80 relating to Conduct of Vacancy Hearings; §13.81 relating to Appearance of Parties at Vacancy Hearings; Representation; §13.82 relating to Commissioner's Final Order and Record of Proceedings; and §13.83 Determination of Good-Faith Claimant Status. The adopted new sections are pursuant to Texas S.B. 1103 79th Leg., R.S. (2005) which amended Texas Natural Resources Code, Chapter 51, Subchapter E. The Legislature amended the vacancy statute to create a more expedient and efficient administrative process for processing vacancy applications for landowners, interested and affected property interest owners, good faith claimants and applicants. These rules establish the requirements of the administrative proceedings included in the new statute.

Adopted §13.71, relating to General provisions describes the rules applicability, delegations by the commissioner, and incorporates the Administrative Procedure Act, Chapter 2001, Texas Government Code. Adopted §13.72, relating to Definitions provides definitions for additional terms used in the rules but not defined by the statute.

The Legislature's amendment of Texas Natural Resources Code, Chapter 51, Subchapter E included additional deadlines to the GLO's administrative process for processing vacancy applications. The new statute allows for extension of the deadlines under Tex. Nat. Res. Code §51.174(b) and adopted §13.73, relating to Extension of Deadlines explains how requests for extensions shall be submitted and granted. The rule also allows the Commissioner to suspend such the deadlines in the statute for good cause or extreme circumstances outlined in the proposed rule.

The new statute significantly amended the application process and proposed §13.74 relating to Application Process explains the GLO's initial processing of the vacancy application and when a vacancy application may be refuse for filing and dismissed without prejudice. The new statute greatly increased the definition of property interests under which a person now may be defined as a Necessary Party to the vacancy application and process. Adopted §13.75, relating to Exceptions to Application, explains how the Necessary Parties may file their exceptions to the Vacancy Application pursuant to the new statute.

As with the previous laws governing the Vacancy process, the commissioner has the statutory authority to recover from the applicant certain costs the agency expends in processing and investigating the vacancy application. The commissioner under the new statute shall require the applicant to submit a deposit to cover the reasonable costs and adopted §13.76, relating to Deposits describes how the commissioner shall use the deposit, how the applicant may submit the requested funds to the agency, the time frame for submission of the deposit or supplemental deposits, and failure to do so will result in the termination of that particular vacancy application.

Under the new statute the commissioner has the discretion as to the appointment of a surveyor for a particular vacancy application. If the commissioner decides a surveyor is needed, the commissioner shall appoint a licensed land surveyor who is not associated with the vacancy application to prepare a report in accordance with the statutory requirement under Tex. Nat. Res. Code §51.185. Adopted §13.77, relating to Disqualification and Removal of an Appointed Surveyor, details the process the GLO will take if a Necessary Party submits a petition to the commissioner requesting the removal of a surveyor because of bias, prejudice or conflict of interest. The adopted rule contains the deadline for filing the exception and the form and content of the petition the Necessary Party must submit. The adopted rule details of the hearing the GLO will hold to consider the petition and how the commissioner will make a determination on the petition. The adopted rule also allows the commissioner to remove a surveyor for bias, prejudice or conflict of interest on his own motion but in accordance with the requirements of this proposed section.

In order to ensure that all possible property interest owners receive notice of the vacancy application, the Legislature added a new Attorney Ad litem requirement. If an applicant cannot provide evidence that the applicant owns all the property interests in the land surrounding the land claimed to be vacant, the commissioner must appoint an Attorney Ad litem to ensure that all such property interest owners are identified and properly noticed. Adopted §13.78, relating to Attorney Ad litem explains that the ad litem will search all property records identified in the statute, as well as any other records related to the land claimed to be vacant that in the reasonable professional judgment of the at litem will ensure that all Necessary Parties are identified. The ad litem will present the results of his or her search to the commissioner in order for those identified parties to receive notice of the pending vacancy application. The Attorney Ad litem will represent those parties that have not been located in accordance with the statute for the duration of the vacancy proceedings. The addition of the Attorney Ad litem will ensure that all reasonable steps have been taken to identify any property owners that may have an interest in the land claimed to be vacant and that those parties may participate, if they so choose, in the vacancy application process.

The Legislature amended the vacancy hearing process to bring the hearings back under the Administrative Procedure Act, Chapter 2001, Texas Government Code (APA). The GLO will still hold the hearings, the State Office of Administrative Hearings will not be involved; however the GLO will use the hearing procedures under the APA to ensure that all property interest owners are accorded due process in the determination of whether a vacancy exists. Adopted §13.79, relating to Forms of Pleadings contains the requirements for pleadings that Nec-

essary Parties may file for the hearing. Adopted §13.80, relating to Conduct of Vacancy Hearings explains that the vacancy hearings will be conducted in accordance with the APA and includes the actions that each Necessary Party may take during the hearing such as calling witnesses and the right to cross examination. Adopted §13.81, relating to Appearance of Parties at Vacancy Hearings; Representation discusses how parties may either represent themselves or have an attorney or other representative represent their interests in the vacancy hearing. This section also includes the expected conduct and decorum of all parties attending the hearings and the commissioner's ability to remove people from such hearings under certain circumstances.

As with the previous legislation governing Vacancies, the commissioner must issue a final order determining whether a vacancy exists under the pending vacancy application. Adopted §13.82, relating to Commissioner's Final Order and Record of Proceedings contains the administrative processes the commissioner and staff will follow upon the execution of the a final order. All Necessary Parties will receive a copy of the final order and attachments. Each Final Order will contain a staff recommendation, list of documents examined and staff consulted, and findings of facts and conclusion of law. The GLO will filed a Notice of Claim of Vacancy with the real property records of the County Clerk and County Surveyor no later than the 121st day of the date of the commissioner's final order in the event the commissioner determines a vacancy exists.

The Legislature expanded the definition of persons who may claim to be Good Faith Claimants under the vacancy statute to include mineral estate holders, royalty interest holders, persons holding easements or right-of-ways in the land claimed to be vacant, and persons who used the alleged vacancy for any purpose including the exploration of oil, gas, sulphur, other minerals or geothermal resources, or persons holding title under persons described more fully in section 51.172, Tex. Nat. Res. Code (Vernon Supp. 2005). Adopted §13.83, relating to Determination of Good-Faith Claimant Status explains the documentary evidence a person applying for Good Faith Claimant Status must submit to the commissioner as well as the Good Faith Claimant affidavit. Those documents include among others, documents establishing previous use, proof of color of title and a statement of fact supporting the good faith belief that the vacant land was within the boundaries of land to which they claimed title. If there exist multiple parties claiming Good Faith Status to the same portion of land, adopted §13.83, relating to Determination of Good-Faith Claimant Status, provides a priority of claims under which the status will be granted that accords with the description of Good Faith Claimants under §51.172(2)(B), Tex. Nat. Res. Code (Vernon Supp. 2005). If a person is denied their good faith claimant status, under §51.193(1), that person may request a hearing regarding that determination. Adopted §13.83 states that such a hearing will be held in accordance with 31 TAC, Part 1, Chapter 2 Subchapter B §§2.31 - 2.36, relating to Procedures for Non-Contested Case Hearings.

These rules apply to all vacancy applications filed after June 17, 2005, the date when amended Tex. Nat. Res. Code §§51.171 through 51.195 became effective. These rules supplement the new statutes by including the necessary administrative processes the GLO staff needs in order to effectively carry out the statutory authority granted in the amended statutes.

No comments were received regarding the adoption of the repeal of Title 31, Part 1, Chapter 13, Subchapter F, relating to Application to Purchase or Lease Vacant and Unsurveyed Public School Land, §§13.71 - 13.86 of the Texas Administrative Code or the adoption of new Subchapter F, relating to Vacancy Process, §§13.71 - 13.83 of the Texas Administrative Code.

SUBCHAPTER F. APPLICATION TO PURCHASE OR LEASE VACANT AND UNSURVEYED PUBLIC SCHOOL LAND

31 TAC §§13.71 - 13.86

These rules are adopted under the authority of Tex. Nat. Res. Code §§51.174(c) and 51.175 Tex. Nat. Res. Code (Vernon Supp. 2005) which authorizes the commissioner to adopt rules necessary and convenient to administer the vacancy subchapter and the SLB to adopt rules for among other things establishes the preferential rights of good faith claimants under the statute respectively.

Tex. Nat. Res. Code, Sale and Lease of Vacancies, §§51.171 through 51.195, are affected by these adopted rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603501
Trace Finley
Policy Director
General Land Office
Effective date: July 19, 2006
Proposal publication date: May 19, 2006
For further information, please call: (512) 475-1859

♦ ♦ ♦

SUBCHAPTER F. VACANCY PROCESS

31 TAC §§13.71 - 13.83

These rules are adopted under the authority of Tex. Nat. Res. Code §§51.174(c) and 51.175 Tex. Nat. Res. Code (Vernon Supp. 2005) which authorizes the commissioner to adopt rules necessary and convenient to administer the vacancy subchapter and the SLB to adopt rules for among other things establishes the preferential rights of good faith claimants under the statute respectively.

Tex. Nat. Res. Code, Sale and Lease of Vacancies, §§51.171 through 51.195, are affected by these adopted rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603500
Trace Finley
Policy Director
General Land Office
Effective date: July 19, 2006
Proposal publication date: May 19, 2006
For further information, please call: (512) 475-1859

♦ ♦ ♦

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 81. INTERACTION WITH THE PUBLIC

37 TAC §81.1

The Texas Youth Commission (the commission) adopts an amendment to §81.1, concerning Public Information Requests, without changes to the proposed text as published in the May 26, 2006, issue of the *Texas Register* (31 TexReg 4362).

The justification for amending the section is the efficient use of agency resources. The amended section requires that requests for public information be submitted in writing. The section also establishes that the commission will not consider public information requests submitted by fax or e-mail as received until the request is submitted to the agency's designated fax number or e-mail address for such requests. This amendment will not affect public information requests delivered via regular mail or in-person, which are considered 'received' upon receipt by any staff.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the under the Texas Government Code, Chapter 552.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603493
Dwight Harris
Executive Director
Texas Youth Commission
Effective date: July 19, 2006
Proposal publication date: May 26, 2006
For further information, please call: (512) 424-6014

♦ ♦ ♦

CHAPTER 87. TREATMENT
SUBCHAPTER B. SPECIAL NEEDS OFFENDER PROGRAMS

The Texas Youth Commission (the commission) adopts the repeal of §87.75 and new §87.75, concerning program services for offenders with mental retardation, without changes to the proposed text as published in the May 26, 2006, issue of the *Texas Register* (31 TexReg 4363).

The new rule sets forth the commission's policy regarding specialized treatment services for youth identified as having a "Priority 1" need for mental retardation services. Primarily, this rule effects an operational change whereby the Corsicana Residential Treatment Center no longer operates a dedicated dormitory for housing offenders with mental retardation. The program will operate instead as a plan of service which can be applied anywhere on campus.

No comments were received regarding adoption of the repeal and new rule.

37 TAC §87.75

The repeal is adopted under the Human Resources Code, §61.034, which provides the commission with the authority to make rules appropriate to the accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603494
Dwight Harris
Executive Director
Texas Youth Commission
Effective date: July 19, 2006
Proposal publication date: May 26, 2006
For further information, please call: (512) 424-6014

♦ ♦ ♦

37 TAC §87.75

The new rule is adopted under the Human Resources Code, §61.075, which provides the commission with the authority to order a child's confinement under conditions it believes best designed for the child's welfare and the interests of the public.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603495
Dwight Harris
Executive Director
Texas Youth Commission
Effective date: July 19, 2006
Proposal publication date: May 26, 2006
For further information, please call: (512) 424-6014

♦ ♦ ♦

CHAPTER 91. PROGRAM SERVICES
SUBCHAPTER A. BASIC SERVICES

37 TAC §91.7

The Texas Youth Commission (the commission) adopts an amendment to §91.7, concerning Youth Personal Property, without changes to the proposed text as published in the May 26, 2006, issue of the *Texas Register* (31 TexReg 4364).

The amended rule includes a reference to a recently adopted rule, §87.4. Section 87.4 addresses certain items youth are allowed to possess as earned privileges, therefore similar content was removed from §91.7.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, §61.034, which provides the commission with the authority to make rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603496
Dwight Harris
Executive Director
Texas Youth Commission
Effective date: July 19, 2006
Proposal publication date: May 26, 2006
For further information, please call: (512) 424-6014

♦ ♦ ♦

CHAPTER 95. YOUTH DISCIPLINE
SUBCHAPTER A. DISCIPLINARY PRACTICES

37 TAC §95.17

The Texas Youth Commission (the commission) adopts an amendment to §95.17, concerning Behavior Management Program, without changes to the proposed text as published in the May 26, 2006, issue of the *Texas Register* (31 TexReg 4368).

The amendment adds assault of a staff/volunteer by offensive contact to the list of rule violations which may result in placement in a behavior management program. The amended section is intended to provide for the safety of staff and volunteers, as well as hold youth accountable for high-risk rule violations.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, §61.075, which provides the commission with the authority to order a child's confinement under conditions it believes best designed for the child's welfare and the interests of the public.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603497
Dwight Harris
Executive Director
Texas Youth Commission
Effective date: July 19, 2006
Proposal publication date: May 26, 2006
For further information, please call: (512) 424-6014

♦ ♦ ♦

CHAPTER 99. GENERAL PROVISIONS

The Texas Youth Commission (the commission) adopts the repeal of §99.19, and new §99.19, concerning youth records disposition. The repeal and new rule are adopted without changes to the proposed text as published in the May 26, 2006, issue of the *Texas Register* (31 TexReg 4368).

The new section changes the retention period for most youth records from 20 to 25 years. Additionally, the new section provides that certain youth education records will be retained permanently, and certain security records are to be destroyed upon the youth's discharge from the commission's custody. The anticipated public benefit as a result of adopting the section is the efficient use of commission resources.

No comments were received regarding adoption of the repeal and new rule.

SUBCHAPTER A. YOUTH RECORDS

37 TAC §99.19

The repeal is adopted under Human Resources Code §61.034, which provides the commission with the authority to make rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603498
Dwight Harris
Executive Director
Texas Youth Commission
Effective date: July 19, 2006
Proposal publication date: May 26, 2006
For further information, please call: (512) 424-6014

♦ ♦ ♦

37 TAC §99.19

The new rule is adopted under Human Resources Code §61.073, which requires the commission to keep written records of all examinations and conclusions based on them and of all orders concerning the disposition or treatment of each child subject to its control.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 29, 2006.

TRD-200603499
Dwight Harris
Executive Director
Texas Youth Commission
Effective date: July 19, 2006
Proposal publication date: May 26, 2006
For further information, please call: (512) 424-6014

♦ ♦ ♦

TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT
SUBCHAPTER F. ADVISORY COMMITTEES

43 TAC §1.85

The Texas Department of Transportation (department) adopts amendments to §1.85, concerning department advisory committees. Section 1.85 is adopted without changes to the proposed

text as published in the April 14, 2006, issue of the *Texas Register* (31 TexReg 3235) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Section 1404 of Public Law 109-59, referred to as SAFETEA-LU, created a new federal Safe Routes to School (SRS) Program. Program guidance issued by the Federal Highway Administration, United States Department of Transportation, recommends that states involve experts and professionals representing a broad spectrum of stakeholders to assist with implementation of the program. Accordingly, the composition of the existing Bicycle Advisory Committee is modified to allow the committee to assist the department in evaluating and selecting candidate projects for SRS funding.

Adopted language to §1.85(a)(4) adds the SRS program as a specific purpose of the committee. The representation is also expanded to include interested parties to allow for the inclusion of additional members with the expertise necessary to review and evaluate applications submitted for the SRS Program.

An amendment is adopted to provide that the committee will report its findings and recommendations regarding the SRS Program to the director of the department division responsible for administering the SRS program.

COMMENTS

Comments to the proposed amendments were received from the Texas Bicycle Coalition.

Comment:

The Texas Bicycle Coalition (TBC) requested a change to §1.85(a)(4)(A) regarding the composition of the Bicycle Advisory Committee (BAC). The department proposed a change to the existing text to allow the BAC to be expanded to include both bicyclists and other interested parties. The BAC requested that this language be changed to allow the inclusion of bicyclists with an interest in various fields such as health, safety, recreation, tourism, education, fitness, law enforcement and planning.

Response:

The department declines to adopt this change. The department believes that it will be important during the evaluation of SRS projects to have a broad spectrum of individuals with a variety of experiences and not limited to either bicyclists or the suggested areas noted by the commenter. The department believes that the proposed language will provide flexibility to include members with the needed expertise, including those suggested by the commenter.

Comment:

TBC requested that BAC provide recommendations on the SRS projects directly to the Texas Transportation Commission (commission) instead of making a report to the department.

Response:

Under the provisions of the adopted rule BAC will be providing a vital role in the selection of SRS projects. In relation to the SRS Program, BAC will report to the department and their recommendations will be reviewed and evaluated with other information gathered from department staff, such as the feasibility of the project, construction and maintenance issues. The commission will receive one recommendation based on all relevant issues. BAC will continue to report directly to the commission on other pedestrian and bicycle issues.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603538
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: July 20, 2006
Proposal publication date: April 14, 2006
For further information, please call: (512) 463-8683

CHAPTER 25. TRAFFIC OPERATIONS
SUBCHAPTER I. SAFE ROUTES TO SCHOOL PROGRAM

43 TAC §§25.500 - 25.505

The Texas Department of Transportation (department) adopts amendments to existing §§25.500-25.504 and new §25.505, concerning the safe routes to school program. The amendments to §§25.500, 25.502, and 25.504 are adopted with changes to the proposed text as published in the April 14, 2006, issue of the *Texas Register* (31 TexReg 3236). The amendments to §§25.501, 25.503, and 25.505 are adopted without changes to the proposed text as published in the April 14, 2006, issue of the *Texas Register* (31 TexReg 3236) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS AND NEW SECTION

Section 1404 of Public Law 109-59, SAFETEA-LU, created a new federal Safe Routes to School (SRS) Program. This proposal is designed to amend the existing state program rules to allow implementation of the new federal program.

Section 25.500, Purpose, is amended to replace the reference to the state Safe Routes to School Program created under Transportation Code, §201.614 with the new federal program created under SAFETEA-LU. The section also notes that the SRS program will be a comprehensive program designed to enable and encourage all children to bicycle and walk to school, promote safety, reduce traffic, reduce fuel consumption, encourage a healthy and active lifestyle from an early age, and improve air quality in the vicinity of schools.

This section is also amended to remove the reference to local contributions since these are not required under the new federal program.

Section 25.501, Definitions, changes the existing definition of "school" to "eligible school" to include those schools comprised of any grades from kindergarten to eighth grade. This change is consistent with the requirements of federal law and program guidance.

Section 25.501(8), public property, is also modified to include property owned by any public entity or school district. This change broadens the location for an SRS project and is consistent with federal law.

Various changes are adopted for §25.502, Project Eligibility, to bring the Texas SRS program into compliance with federal law and program guidance as issued by the Federal Highway Administration.

Language regarding eligible applicants is deleted from §25.502 since it is repeated in §25.503 regarding project applications.

The amendments make various changes to allow both infrastructure and non-infrastructure applications to be submitted under the SRS program.

Language allowing improvements for vehicle drop-off and pick-up areas as an eligible infrastructure project is deleted since this is specifically prohibited under the new federal program guidance. The provision for secure bicycle parking facilities is added as an eligible project since the federal guidance specifically allows this.

Language is added outlining the types of non-infrastructure projects that may be submitted for funding consideration. This is not a comprehensive list, but provides general categories.

Section 25.502 is also amended to allow an SRS infrastructure project to be built on any public right of way within a two-mile radius of an eligible school. The section is also amended to allow projects to be located on private property under certain circumstances that guarantee public access to the project. Again, these changes are consistent with federal guidance.

The word "department" is deleted from §25.502(e) regarding funding sources since SRS projects will now be funded primarily with federal funds earmarked specifically for the SRS program.

Existing language on local contributions is deleted since this is not required under the new federal program. The new SRS program allows for 100% federal funding for the selected projects.

Section 25.502(f), regarding project boundaries, is amended to be consistent with federal guidelines. Language is also added to subsection (f) describing eligible project boundaries for non-infrastructure projects.

Section 25.503, Project Application, discusses the requirements for SRS project applications. The section is amended to note that the department will issue separate applications for infrastructure and non-infrastructure projects.

Language is adopted to allow infrastructure projects to be submitted by political subdivisions as defined in §25.501 or a state agency. The department believes that state agencies will have valuable insight into projects that may benefit the safety of school age children and should also be allowed to develop and submit project proposals.

Language is also adopted to allow non-infrastructure projects to be submitted by political subdivisions as defined in §25.501, schools and school districts, non-profit organizations, for-profit organizations, the state of Texas or any combination of these entities. The department believes that many organizations, including those that have not traditionally partnered with the department, will have insight into projects that may prove beneficial to the development of a successful SRS program.

Language is clarified to detail how both infrastructure and non-infrastructure project proposals are submitted. Infrastructure projects must be submitted to the department district in which the project is located. This new language notes that should a project extend to beyond more than one district, the applicant should contact the department division responsible for the program to identify the appropriate department district for project submission.

This new language also requires non-infrastructure projects to be submitted to the department division administering the SRS program.

Amendments to §25.504, regarding project evaluation and selection, broaden the expertise of the existing evaluation committee of department staff. The section is also amended to allow this committee to be appointed by the executive director or his or her designee.

Section 25.504 is also amended to include the department's Bicycle Advisory Committee, created under §1.85, as part of the project evaluation process. Section 1.85 is amended under a separate, simultaneous rule action adopted in connection with these amendments.

Section 25.504 is amended to note that both evaluation committees will report their findings to the director of the division responsible for administering the program. The committees are required to use the evaluation methodology developed by the division administering the program to ensure uniformity and consistency in project evaluation. The appropriate division director will review all recommendations and will prepare the final proposal for the Texas Transportation Commission (commission).

The adopted language creates separate evaluation criteria for infrastructure and non-infrastructure projects.

Language is adopted to add the potential for a project to create a safer walking and bicycling built environment within two miles of a school as an evaluation selection criterion. This item is taken directly from the federal program guidance and the department believes it represents a significant benchmark to be considered when evaluating these types of projects.

This proposal also reformats two criteria (link to a comprehensive traffic safety plan and other relevant factors) that were previously noted as providing additional consideration when submitted by applicants. These items are now simply included as parts of the evaluation criteria.

Selection criteria for non-infrastructure projects are included in the adopted language.

The adopted language creates an approval process in which the director of the division responsible for administration of the Safe Routes to School Program provides a recommendation to the commission. The commission will select the final projects from those recommended by the division director.

Language relating to project overruns in §25.504(f) is deleted and added as new language to the adopted new §25.505(d).

New §25.505, Project Funding and Monitoring, is added to provide guidance on various aspects of project funding. This section notes that the Safe Routes to School Program is a reimbursement program, denotes the minimum allocation percentages between infrastructure and non-infrastructure projects, notes that there are no required local contributions, notes that project overruns will be considered by the department on a case-by-case basis, and that the commission may allocate funding to the department for state initiated projects. These provisions provide con-

sistency with the federal Safe Routes to School Program guidelines.

New §25.505(f), regarding project monitoring and evaluation, is consistent with the federal program guidelines and also represents prudent and responsible stewardship of public funds.

COMMENTS

Comments on the proposed amendments and new section were received from the Texas Bicycle Coalition (TBC).

Comment:

TBC requests that the rules require a 70% allocation for infrastructure projects with a 30% allocation for non-infrastructure projects.

Response:

The department disagrees with this comment. The proposed rules require a minimum of 10% and a maximum of 30% of SRS Program funds be allocated to non-infrastructure projects. This is consistent with both federal law and guidance. The proposed rules would allow, but do not require, up to 30% of SRS program funds to be allocated to non-infrastructure projects. The rules as proposed provide maximum funding flexibility.

Comment:

TBC requests that the department split responsibility for implementation of the SRS Program between the Traffic Operations Division and Transportation Planning and Programming Division.

Response:

The department disagrees with this comment. Under the rules as proposed, implementation of the program is assigned to the director of a single division of the department. However, there is nothing in the rules that would preclude involving other divisions as suggested by TBC should the department believe this is necessary. Currently, the department's Traffic Operations Division is assigned responsibility for overall development and implementation of the program. The Traffic Operations Division has extensive experience in managing both infrastructure and non-infrastructure safety programs and requests guidance and counsel from other divisions as necessary.

Comment:

TBC requests that the proposed rules be changed to require a full-time program coordinator that is 100% dedicated to the SRS Program.

Response:

The department declines to adopt this suggestion. Hiring of staff is outside the scope of the rule process. The Federal Highway Administration has approved the naming of an interim coordinator and it is the department's intent to hire a full-time coordinator once the workload justifies this position.

Comment:

TBC requested that incentives for early completion be included for recipients of SRS infrastructure awards.

Response:

The department declines to adopt this comment. Successful SRS projects will be 100% funded and require no local matching funds. The department believes that when combined with internal requirements to use these funds within certain time periods that this will ensure that these projects are completed in a timely manner.

Comment:

TBC requests that BAC provide their recommendations on project selection to the commission.

Response:

The department declines to accept this change requested by TBC. Under the proposed rules, SRS projects will be evaluated by BAC and a technical committee made up of department staff. The division director will review both sets of recommendations before delivering a final project list to the commission. The administrative and engineering tasks are more appropriately handled at the staff level and a combined final recommendation should provide the commission the information needed to reach a final determination. This approach is consistent with that taken during the initial SRS Program.

Comment:

TBC noted that BAC could serve as a multi-disciplinary task force on the SRS Program if the committee were expanded.

Response:

The rules as proposed will allow for BAC to serve as a multi-disciplinary committee to provide recommendations on SRS Program applications.

Comment:

TBC requests retaining language in §25.500 referencing the existing state SRS Program.

Response:

The department disagrees with this comment. The new program created by federal law will incorporate the existing state SRS Program. This new program will incorporate both state and federal dedicated funds into a single program consistent with federal law. The department believes there is no need to retain reference to the state program as the state program does not provide for the disbursement of funds from the new federal program.

Comment:

TBC requests the inclusion of language in §25.500 regarding the purpose of the program to "encourage a healthy and active lifestyle from an early age".

Response:

The department concurs and has incorporated the suggested language into the rule.

Comment:

TBC requests that the department strike the word "competitive" in §25.500 and replace with "comprehensive".

Response:

The department disagrees with this comment as the SRS Program is competitive in nature. The department acknowledges in this section that the SRS Program is a comprehensive program, but also wishes to inform the public and potential applicants that the program is competitive in nature with regard to funding.

Comment:

TBC requests that the words "for off-system roads" be removed from §25.502(b)(6).

Response:

The department disagrees with this comment. Removing this language would allow the use of traffic calming devices on portions of the state highway system. The department believes the use of these devices (such as speed bumps and speed humps) is inappropriate for use on the higher speed roads of the state highway system.

Comment:

TBC requests that the phrase "thereby encouraging a healthy and active lifestyle from an early age" be added to proposed §25.502(c)(4) regarding the eligible non-infrastructure projects.

Response:

The suggested language has been incorporated into §25.500 regarding the purpose of the program.

Comment:

TBC requests that the language of §25.502(e) be changed to require the commission, rather than the executive director, to limit maximum funding for an individual project.

Response:

The department believes that setting the maximum funding amount allowed per project is more appropriately established at the level of the executive director. However, the commission has ultimate authority over all department programs.

Comment:

TBC requested that proposed §25.502(f)(2) be modified to strike language requiring projects involving multiple school sites to have similar improvements.

Response:

The department concurs with this comment and will incorporate this change by eliminating proposed paragraph (2) and renumbering accordingly. This change will allow multiple schools to work together on proposals without requiring that they request similar improvement projects.

Comment:

TBC requested that §25.502(f)(3) be modified to remove the phrase "schools in a region or district" and add language to denote that the scope of non-infrastructure projects may be extremely broad.

Response:

The department concurs with this comment and has incorporated this change. The department did not intend to limit the area encompassed in non-infrastructure projects. The language has been changed so that it is clear that projects can be presented by a broad combination of organizations.

Comment:

TBC requested that proposed §25.502(g) be modified to deny the department the authority to disqualify a proposed SRS project on the state highway system if that project interferes or disrupts planned improvements or existing infrastructure.

Response:

The department disagrees with this comment and believes it is important to integrate any potential SRS project into the existing state highway system and for such projects not to conflict with planned improvements or existing highway infrastructure.

Comment:

The commenter requested that §25.503(b) be modified to require the department to issue separate program calls for infrastructure and non-infrastructure projects.

Response:

The department declines to adopt this change requiring separate applications and program calls. As adopted, the rule allows the department the flexibility to allow for separate or combined calls.

Comment:

The commenter requested that for-profit organizations be eliminated from §25.503(c)(2) noting that this was not consistent with the federal program guidance.

Response:

The department disagrees with this suggested change and notes that federal guidance encourages states to promote a broad spectrum of participation and does not state that for-profit organizations are restricted from participating in the program.

Comment:

TBC requests that language also be added to §25.503 that would allow non-infrastructure projects to be let to a single entity under certain circumstances.

Response:

The department disagrees with this suggested change. SRS projects are not "let," which implies a bidding process. These projects are awarded to applicants through a competitive evaluation. The department believes the suggested language is unnecessary since the proposed rules specifically allow for the consideration of statewide projects. The department believes that under the proposed rules the non-infrastructure portion of the program could be awarded to a single applicant.

Comment:

TBC requests addition of new §25.503(d)(3) noting that non-infrastructure projects will be solicited by a separate project call and that these projects may be considered in a multi-year proposal for up to five years.

Response:

The department declines to add this new language. There is nothing in the proposed rules that would preclude implementing the suggested addition should the department choose to do so.

Comment:

TBC requests that the department take into consideration the overall Texas school calendar in issuing program calls.

Response:

The department disagrees with this comment. The department will consider the Texas school calendar and school district planning cycles in issuing program calls. However, the department does not see the necessity of incorporating this limitation into the program rules.

Comment:

TBC requests that language be added to §25.503 that specifically requires the department to include the BAC in the ongoing development and operation of the SRS Program.

Response:

Although the department intends to utilize BAC in the evaluation of SRS projects, it declines to adopt this recommendation. However, the department intends to solicit input from interested parties (including BAC) to make improvements in all future program calls.

Comment:

TBC requests the rules require the SRS program be managed by the State Bicycle Coordinator in the Transportation Planning and Programming Division.

Response:

The department disagrees with this comment. The assignment of job functions and duties is outside the scope of these rules.

Comment:

TBC requests changes in §25.504(b)(3) to require the department to include TBC in the development of the methodology that will be used to evaluate SRS project.

Response:

The department disagrees with this comment. The department staff will develop the methodology used to evaluate SRS proposals. The staff understands the proposal process and will be able to determine all necessary issues including those involving construction. However, the department intends to solicit input from interested parties (including the BAC) to make improvements in all future program calls as needed.

Comment:

TBC requests that language be added to §25.504 to require SRS project applications and evaluations be made available for public inspection.

Response:

The department disagrees with this comment. The release of documents collected under the SRS program is subject to the state's public information act and additional language is unnecessary.

Comment:

TBC requested that §25.504(c) be amended to note that infrastructure projects would be evaluated based on the ability of the project to benefit the largest number of children.

Response:

The department declines to adopt this change as it could create a disadvantage for less populous areas.

Comment:

TBC requested that §25.504(c)(3) be amended to note that projects will be evaluated based on the demonstrated need of the "community and children served."

Response:

The department concurs and will incorporate the suggested language into the final rule. The department finds the suggested language clarifies the criteria objective to provide funds to those projects that can show a need for the funds.

Comment:

TBC requests that §25.504(c)(9) be modified to note that SRS infrastructure applications will be evaluated based on compliance with state and federal design criteria as opposed to design criteria established by the division director responsible for administration of the program.

Response:

The department disagrees with this comment. Although all design criteria for the program will be compliant with state and federal standards, it is possible that there may be unique design issues specific to the SRS program. There may be instances where Texas chooses to use design criteria based on local conditions that, while approved by the Federal Highway Administration, may not yet be incorporated into existing federal standards.

Comment:

TBC requests that the criteria for evaluation of non-infrastructure projects contained in §25.504(d)(1) related to the identification of the proposed project to encourage and promote walking and bicycling be eliminated.

Response:

The department disagrees with this comment as it believes this is one of the key goals of the SRS Program.

Comment:

TBC requests that language be added to §25.504(d)(3) specifically referencing criteria developed by the Texas Education Agency related to health and physical activity.

Response:

The department disagrees with this comment. The department prefers not to reference any specific outside criteria that do not relate directly to SRS issues.

Comment:

TBC requests that language in §25.504(d)(6) that requires non-infrastructure applications demonstrate a link to an existing planned comprehensive traffic safety plan be eliminated and that §25.504(d) contain a plan for evaluating the success of non-infrastructure projects.

Response:

The department concurs and has changed language accordingly. Non-infrastructure projects, such as education and outreach programs, do not need to demonstrate a link to a traffic safety plan. The department also agrees that requiring a plan to evaluate the success of the project will be useful in awarding SRS funds.

Comment:

TBC requests that the evaluation criteria in §25.504(d) be modified to include the applicant's prior experience with SRS projects and other relevant experience.

Response:

The department disagrees with this suggested change. The state and federal SRS Programs are new and there will be very few organizations and individuals with relevant and specific experience in this area. The department believes that to include this change would significantly limit opportunities for program participation.

Comment:

TBC requests that the language in §25.504(e) be amended to require the commission to approve SRS projects based on the

recommendation of BAC rather than from the recommendation of the department official administering the SRS Program.

Response:

The department declines to adopt this suggested change. The proposed evaluation process will use a simultaneous review of SRS project applications by an internal committee of department staff and BAC. The department believes that merging those two sets of recommendations into a final project list represents an engineering and administrative task more appropriate for department staff.

Comment:

TBC requests that recipients of non-infrastructure projects under §25.505 be provided with a "working capital advance" as allowed under federal regulations 49 CFR Part 19.22(2)(e) and 49 CFR Part 18.21(e).

Response:

The department disagrees with this comment. The department adheres to all federal law and regulations in its administration of programs, including those recommended.

Comment:

TBC requests changes in §25.505 that would require the department to contract for an outside evaluation of the program, to report to the commission, and to provide an annual status report to the commission, elected officials, and the general public.

Response:

The department disagrees with these comments. These issues pertain to internal department operations. Nothing in the proposed rules precludes the department from incorporating these tasks into the SRS Program should it believe that they are necessary.

Comment:

TBC requests changes to the rule to include reporting to the commission other funding opportunities for the SRS program.

Response:

The department disagrees with this comment. The commission is well informed of available funds, therefore a specific rule requiring reporting available funds is unnecessary. The department will utilize all funds as they become available.

STATUTORY AUTHORITY

The amendments and new section are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§25.500. Purpose.

Section 1404 of Public Law 109-59 created a federal Safe Routes to School Program. This subchapter implements this program. The overall purpose of this program is to enhance safety in and around school areas through a comprehensive program designed to improve the bicycle and pedestrian safety of school age children; encourage a healthy and active lifestyle from an early age; enable and encourage children, including those with disabilities, to walk and bicycle to school; and to facilitate projects and activities that will improve safety and reduce traffic, fuel consumption, and air pollution in the vicinity of schools. The Safe Routes to School Program is a competitive program funded through state and federal funds. The sections under this subchapter prescribe the policies and procedures for the implementation of the program.

§25.502. Project Eligibility.

(a) Types of projects. Projects eligible to receive funding under this program include those involving both infrastructure related and non-infrastructure related activities.

(b) Infrastructure projects. Eligible infrastructure based projects include:

(1) sidewalk improvements such as new sidewalks, widened sidewalks, sidewalk gap closures, sidewalk repairs, curb cuts for ramps, and the construction of curbs and gutters;

(2) pedestrian/bicycle crossing improvements such as new or upgraded traffic signals, crosswalks, median refuges, pavement markings, traffic signs, pedestrian or bicycle over-crossings and under-crossings, flashing beacons, traffic signal phasing extensions, bicycle sensitive actuation devices, pedestrian activated signal upgrades, and sight distance improvements;

(3) on-street bicycle facilities such as new or upgraded bicycle lanes, widened outside lanes or roadway shoulders, geometric improvements, turning lanes, channelization and roadway realignment, traffic signs, and pavement markings;

(4) traffic diversion improvements including separation of pedestrians and bicycles from vehicular traffic adjacent to school facilities, and traffic diversion away from school zones or designated routes to a school;

(5) off-street bicycle and pedestrian facilities including exclusive multi-use bicycle or pedestrian trails and pathways;

(6) traffic calming measures for off-system roads such as roundabouts, traffic circles, curb extensions at intersections that reduce curb-to-curb roadway travel widths, center islands, full and half-street closures, and other speed reduction techniques;

(7) secure bicycle parking facilities; and

(8) other projects that promote pedestrian and bicycle safety of children in and around school areas.

(c) Non-infrastructure projects. Non-infrastructure projects are those activities designed to encourage walking and bicycling to school. Eligible projects include:

(1) public awareness campaigns and outreach efforts to the news media and community leaders;

(2) traffic education and enforcement in the vicinity of schools;

(3) providing student education on bicycle and pedestrian safety, health, and the environment; and

(4) other projects that promote pedestrian and bicycle safety of children in and around school areas.

(d) Location for infrastructure projects. Infrastructure projects must be located within public right of way within a two-mile radius of an eligible school. The proposal may include projects that are located:

(1) on or off the dedicated state highway system; or

(2) on private lands that have a public easement if there is a written legal easement or other written legally binding agreement that ensures public access to the project.

(e) Project cost limitations. The executive director may limit the maximum amount of funding participation per project for each year of the program. This limitation will be based on the availability of and demand for program funding and may be established with each call for projects issued under this subchapter. The project cost limitation will apply to all projects submitted for consideration.

(f) Eligible project boundaries.

(1) Infrastructure project applications may be in connection with a single school campus, multiple schools, a region, or a school district.

(2) Non-infrastructure projects may cover a single school, multiple schools, school district, multiple school districts, multiple regions, or be statewide in nature.

(g) Projects proposed on the state highway system. Any proposed infrastructure project under this program on the state highway system will not be eligible if the district finds that the project interferes or disrupts any planned improvements or existing infrastructure.

§25.504. Application Evaluation and Selection.

(a) Application evaluation. The responsible division will review each program application for completeness and compliance with project eligibility requirements described in §25.502 of this subchapter. Applications that do not comply with these requirements or that are not received by the published deadline will not be evaluated.

(b) Project evaluation process.

(1) The executive director or designee will appoint a project evaluation committee of department staff with expertise in bicycle safety, pedestrian safety, roadway safety, roadway design, traffic engineering, or other related fields to review, evaluate, and make recommendations on the proposals submitted for the program.

(2) The department's Bicycle Advisory Committee, as created under §1.85 of this title (relating to department advisory committees), will also serve as a project evaluation committee to review, evaluate, and make recommendations on the proposals submitted for the program.

(3) The project advisory committees will evaluate the proposals using the evaluation methodology developed by the responsible division administering the program.

(4) The project advisory committees will provide their project selection recommendations and supporting documentation to the director of the responsible division administering the program.

(5) The director of the responsible division administering the program will recommend a program of candidate projects for consideration by the commission.

(c) Selection criteria for infrastructure projects. Safe Routes to School applications for infrastructure projects meeting all requirements included in §25.502 will be evaluated based on the following selection criteria:

(1) identification of current and potential safe walking and bicycling routes to school;

(2) the potential of the proposal to create a safer walking and bicycling built environment within two miles of a school;

(3) the demonstrated need of the community and the children served;

(4) identification of safety hazards;

(5) the potential of the proposal to reduce child injuries and fatalities;

(6) the potential of the proposal to encourage walking and bicycling among students;

(7) support for the project by the community and interested parties;

(8) identification of detailed construction costs;

(9) compliance with design criteria established by the responsible division;

(10) applications that demonstrate a link to an existing or planned comprehensive traffic safety plan; and

(11) other factors relating to the proposed project deemed necessary to promote pedestrian and bicycle safety of children in and around school areas.

(d) Selection criteria for non-infrastructure projects. Safe Routes to School applications for non-infrastructure projects meeting all requirements included in §25.502 of this subchapter will be evaluated on the following selection criteria:

(1) identification of the current and potential overall need for programs to encourage and promote walking and bicycling to the proposed project location;

(2) identification of existing safety hazards and the need for a behavioral program to increase awareness of those issues;

(3) the potential of the proposal to reduce child injuries and fatalities through education, enforcement, or other activities;

(4) the potential of the proposal to encourage walking and bicycling among students;

(5) support for the project by the community and interested parties;

(6) a plan for evaluating the success of the project; and

(7) other factors deemed necessary to promote pedestrian and bicycle safety of children in and around school areas.

(e) Commission approval. Approval by the commission will be based on the recommendations from the director of the responsible division administering the program, funding availability, the safety of the traveling public, the overall goals of the program, and safety in and around school areas.

(f) Approved projects. After approval by the commission, the department will notify applicants of the project selection status.

(1) Approved infrastructure projects must comply with design, plan preparation, letting requirements, and other requirements established by the director of the responsible division.

(2) Approved non-infrastructure projects must comply with the requirements established by the director of the responsible division included in the call for project proposals.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603539

Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: July 20, 2006
Proposal publication date: April 14, 2006
For further information, please call: (512) 463-8683

♦ ♦ ♦

CHAPTER 31. PUBLIC TRANSPORTATION

The Texas Department of Transportation (department) adopts amendments to §31.11, Formula Program, and §31.36, Section 5311 Grant Program. The amendments to §31.11 and §31.36 are adopted without changes to the proposed text as published in the April 14, 2006, issue of the *Texas Register* (31 TexReg 3241) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §456.022 requires the Texas Transportation Commission (commission) to adopt rules to establish a formula allocating state and federal funds among individual eligible public transportation providers. The statute states that the formula may take into account a transportation provider's performance, the number of its riders, the need of residents in its service area for public transportation, population, population density, land area, and other factors established by the commission. Transportation Code, §456.008 states that the commission may establish different performance measures for different sectors of the transit industry and also states that the performance measures shall assess the efficiency, effectiveness, and safety of the public transportation providers.

On May 26, 2005, the commission amended §31.11 and §31.36 regarding formulas for the distribution of state and federal funds. The commission now desires to further refine the formulas to better allocate funding resources; to better reflect the requirements of state and federal law; and to reflect the department's goals to reduce congestion, enhance safety, expand economic opportunity, improve air quality, and increase the value of transportation assets.

The amendments to §31.11, Formula Program, revise the current formula for state funds. Amendments to §31.11(b)(1)(A) provide that funds for small urban transit providers be divided into two tiers. Tier one will include transit providers that restrict transit eligibility for all public transportation services to the elderly and persons with disabilities. State funding available in tier one is calculated by multiplying the available urban funding by the population of elderly and persons with disabilities in tier one providers, divided by the service eligible population of urbanized areas receiving funding under this subchapter. Tier two will include transit providers that provide any service to the general population. The funds for tier two will be the remaining balance of the available funds after the funds for tier one have been allocated. Funds within each tier will be allocated to transit providers based on §31.11(b)(1)(B) and (C). The changes will assist in the allocation of available funding by more accurately reflecting the nature of the service provided. The changes will also reflect the requirements of state and federal law and will reflect an assessment of public transportation provider efficiency, effectiveness, and safety.

Amendments to §31.11(b)(1)(B) and (C) provide that any further distribution of state funds allocated to urban areas be based on the relative proportion of urbanized area population and a weighted average of four performance criteria: local funds per operating expense; ridership per capita; ridership per revenue mile; and revenue miles per operating expense. The relative proportion of urbanized area is intended to capture the need of the transit operator, and the weighted average of the four criteria is intended to capture the performance of the transit operator. The revised allocation of transportation funding will be based on 80% need and 20% performance for fiscal year 2007 (the second year of the 2006-2007 biennium); 65% need and 35% performance for the 2008-2009 biennium; and 50% need and 50% performance for each biennium thereafter. This further emphasizes the performance of individual public transportation providers in allocating funding. The commission recognizes performance as an important aspect of providing public transportation services in an effective and efficient manner, and wishes to increase the emphasis on performance in the allocation of transportation funding as part of the department's plan to improve statewide transportation, enhance safety, and improve air quality.

Section 31.11(b)(1)(B) changes the consideration of population for tier one providers to 199,999, or the city population, whichever is less. The reason for this change is that the urbanized area population may be significantly larger than the population reported for the incorporated jurisdiction. This reflects the actual population eligible to receive service from a particular transit provider and this change more fairly allocates funds to account for that smaller population eligible to receive services.

Section 31.11(b)(1)(C) changes the method for calculating the criterion called "ridership per capita." Formerly, for urban areas with populations greater than 199,999, this criterion was adjusted to limit the impact of the population to 199,999. The department eliminates the provision that defines this criterion. The impact would be to use the total applicable population, and therefore calculate more fairly this performance indicator for those providers in areas with populations greater than 199,999. The department adopts the state funds performance criteria for the urban areas based on the following weighted criteria: 30% local funds per operating expense, 20% ridership per capita, 30% ridership per revenue mile, and 20% revenue miles per operating expense. This amendment to the formula adds two new measures, revenue miles per operating expense and passengers per revenue mile, while deleting one measure, revenue miles per capita. This also changes the allocation from an even distribution to a distribution emphasizing local support and service effectiveness. These changes establish a broader set of measures to emphasize service effectiveness and efficiency. A broader set of measures will create more opportunities for the diverse small urban transit providers to show improvements in performance.

The department deletes provisions that give the commission the authority to allocate a portion of the funds to address strategic priorities. These revisions ensure all funds in these programs are allocated according to the established formula, while retaining the requirement that recipients of funding under this subparagraph be in good standing with the department.

Section 31.11(b)(2)(A) and (B) changes the allocation of state funds for the rural providers based on a figure that represents 75% population and 25% land area, relative to all other rural public transportation providers and on an equally weighted formula of three criteria: local funds per operating expense, ridership per revenue mile, and revenue miles per operating expense. The figure that represents 75% population and 25% land area is in-

tended to capture the need of the transit operator, and application of the equally weighted criteria is intended to capture performance of the transit operator. The new provisions state that the allocation of transportation funding will be based on 80% need and 20% performance for fiscal years 2007 and 2008; and 65% need and 35% performance for fiscal year 2009 and each fiscal year thereafter. These changes increase the emphasis on performance, and reward providers who improve the efficiency or effectiveness of their service.

Section 31.11(b)(2)(B) changes the performance criteria for the rural areas. Currently, the formula considers local funds per operating expense, operating expenses per mile, and operating expense per passenger. The department changes the measure of operating expense per passenger to passengers per revenue mile, and the measure of operating expense per mile to revenue miles per operating expense. The relative weights of the three criteria will not change, but will remain at one third each for the following criteria: local funds per operating expense, ridership per revenue mile and revenue miles per operating expense. These changes provide a measure of service effectiveness. It is an acknowledged goal of the commission to improve service effectiveness, which represents an increase in services provided to the public.

Amendments to §31.11(c) provide that annual adjustments are limited to a maximum 10% decrease from year to year for both the urban and rural providers to provide funding stability. The purpose of this change is to assist public transportation providers in planning for future year funding allocations and to enable continuity of service. The department also adopts changes in purchasing power as an eligible consideration for the award of additional funds. The base year to the state fiscal biennium 2006-2007 is also reset.

Section 31.36, Title 49 USC 5311 Grant Program, changes the current formula and also reflects the federal statutory requirement that the department consult with intercity bus service providers.

Amendments to §31.36(g)(1)(B) concerning inter-city bus regulation reflect changes to federal statutes, which now require the state to consult with the intercity bus service providers under certain circumstances. The changes were enacted in Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, (Pub. L. No. 109-59) (2005), known as "SAFETEA-LU."

Section 31.36(g)(2)(A) and (B) states that federal funds for the rural providers are allocated based on a figure that represents 75% population and 25% land area, relative to all other rural public transportation providers and on an equally weighted formula of three criteria: local funds per operating expense, ridership per revenue mile and revenue miles per operating expense. The figure that represents 75% population and 25% land area is intended to capture the need of the transit operator, and application of the equally weighted criteria is intended to capture performance of the transit operator. The new provisions provide that the allocation of transportation funding will be based on 80% need and 20% performance for fiscal years 2007 and 2008; and 65% need and 35% performance for fiscal year 2009 and each fiscal year thereafter. These changes increase the emphasis on performance, and reward providers who improve the efficiency or effectiveness of their service. Further changes to the performance criteria for the rural areas match the formula for state rural funding allocation. Currently, the formula considers local funds per operating expense, operating expenses per mile, and operating expense per passenger. The department changes the measure of operating expense per passenger to passengers per revenue mile, and the measure of operating expense per mile to revenue miles per operating expense. The relative weights of the three criteria will not change, but will remain at one third each for the following criteria: local funds per operating expense, ridership per revenue mile, and revenue miles per operating expense. The provisions provide a measure of service effectiveness. It is an acknowledged goal of the commission to improve service effectiveness, which represents an increase in services provided to the public.

Section 31.36(g)(3) provides that consideration be made to account for changes in the relative purchasing power of the amounts from year-to-year. The provisions concerning the allocation of excess funds are revised to include consideration of adjustments if changes in purchasing power occur. The department changes the funding baseline from a particular fiscal year to a set level of funding for purposes of determining if additional funds exist. The impact of the change is to increase the baseline by $7,000,000, and move allocation levels closer to the amount determined by the allocation formula, considering both transportation provider need and performance.

The Public Transportation Advisory Committee (PTAC) has met numerous times to discuss the changes to the existing formulas and rules, and to make recommendations to the commission. Four PTAC committee members represent a diverse cross-section of public transportation providers; three members represent a diverse cross-section of public transportation users; three members represent the general public; and one member is designated to have experience in the transportation of clients of health and human services programs. Advice and recommendations expressed by the committee provide the department and the commission with a broader perspective regarding public transportation matters that will be considered in formulating department policies.

PTAC's duties include advising the commission on the needs and problems of the state's public transportation providers, including recommending methods for allocating state public transportation funds, and commenting on rules or rule changes involving public transportation matters during their development and prior to final adoption.

PTAC met on May 19, 2006, and by motion recommended adoption of the amendments.

COMMENTS

The Texas Department of Transportation conducted a public hearing to receive comments concerning the proposed rules. A public hearing was held at 1:30 p.m. on May 4, 2006, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas. This hearing was conducted in accordance with the procedures specified in §1.5 of this title. In addition to comments presented at the public hearing, the department received written comments on adoption of the rule.

COMMENT

The Texas Transit Association (TTA) stated that it "cautiously supported" the rules as proposed. TTA stated that the new formula provides an equitable distribution of funds to the transit operators, however, under the revised formula the majority of both the urban and rural operators will experience a decrease in state funding. TTA further expressed the opinion that the cost is ulti-

mately going to be a loss of service in those communities that have a decrease in both state and federal funding.

RESPONSE

For forecasting the fiscal impact of the proposed changes, appropriations of state funds for public transportation grants were kept at the FY 2006-2007 level. Future appropriations are contingent on legislative actions. Holding the level of funding constant establishes that for any system to increase funding, other systems must receive less. Actual allocations will be based on available funding. Regarding transit service, the type and level of service provided by urban and rural transit districts is determined locally. The allocation formula provides funding in proportion to the need, determined by population or population and land area and performance, to promote effective and efficient delivery of service. No change was made to the rule as a result of the comments.

COMMENT

One commenter stated that the intent of using performance measures tied directly to funding is an excellent plan. Two commenters also noted the critical need to have an accurate and verifiable performance measure evaluation system that defines and measures each performance criterion.

RESPONSE

The department has contracted with the Texas Transportation Institute to facilitate improvements in the collection of accurate performance data. No change to the rule was made as a result of these comments.

COMMENT

Regarding §§31.11(b)(1)(C), 31.11(b)(2)(B) and 31.36(g)(2)(B), one commenter recommended removing the requirement that transit operators have no deficiencies and no findings of non compliance from the rule, stating the wording is ambiguous and could cause a transit operator to lose funding for the smallest of infractions or errors in any area of compliance. The commenter further stated that the provision requiring the transit operator to be in good standing with the department is sufficient language.

RESPONSE

The referenced requirements currently exist in the sections noted by the commenter and the proposed changes retain that current language. In specifying that a transit operator not only be in good standing with the department, but also have no deficiencies and no findings of noncompliance, the requirements are stated unambiguously. The requirements are intended to promote effective and efficient delivery of service, to provide funding in proportion to the need, and to reward effective and efficient performance. The requirement is consistent with the intent of the rules to tie performance measures directly to funding. No change to the rule was made as a result of these comments.

COMMENT

Regarding §31.11(c), two commenters suggested removing the language that references funding exceeding $57,482,135 because this would mean any additional state funds provided by the legislature would be placed into a commission discretionary fund. The commenters state that any state funds provided by the legislature should go directly to the transit operators, not to the commission and they state opposition to a discretionary fund that will potentially grow annually. The commenters suggested instead that the commission discretionary fund be established as a specific dollar amount to be set aside each year or, as an alternative, a maximum percentage of the annual apportioned funds.

RESPONSE

Language establishing a discretionary fund as part of the allocation formula rules was adopted two years ago. The rule sets an explicit dollar amount instead of using a reference to a prior fiscal biennium in order to quantify the funding by a dollar amount rather than by reference to the previous biennium. If additional funds exist, the commission must award the funds to transit providers on a pro rata basis, competitively or a combination of both, in accordance with the rule. Consideration for the award of the additional funds may include, but is not limited to, coordination and technical support activities, compensation for unforeseen funding anomalies, assistance with eliminating waste and ensuring efficiency, maximum coverage in the provision of public transportation services, adjustments for reductions in purchasing power, and reductions in air pollution. The rule already requires that additional funding go to transit operators. The rule establishes a method of distribution that is consistent with accomplishing the department's stated goals and addresses the needs of transit operators for any additional funding that may exist. No change was made to the rule as a result of this comment.

COMMENT

One commenter stated its opposition to the transition for distribution of available funds from 80 percent/20 percent needs-versus-performance to 50 percent/50 percent funds distribution, as set forth in §31.11, for small urban operators. The commenter recommended retaining the 80 percent/20 percent needs-versus-performance distribution of funding until further assessment of the effectiveness of the rule can be made. The commenter also stated its opposition to the proposed transition in distribution of funding for non-urbanized or rural transit operators from 80 percent/20 percent needs-versus-performance to a 65 percent/35 percent split for fiscal year 2009 and thereafter, for the same reasons. Another commenter supports the use of performance measures as a basis of funding, however they believe that the increase in the weighted value of performance measures to 50 percent is premature.

RESPONSE

After much study and public discussion, the Public Transportation Advisory Committee recommended the transitions in funding distribution to transit operators based on a need versus performance ratio, with an increasing emphasis on performance versus need. The department supports this position because it awards a greater share of funds to transit systems that have greater-than-average public transportation service effectiveness, efficiency, or both. The department also recognizes the difference between small urban and rural systems and as such the proposed change in weight between need and performance for rural systems is scheduled to occur after more time has passed. No change to the rule was made as a result of the comment.

COMMENT

One commenter stated concerns regarding the elimination of the five-year transition period, as proposed. The commenter states that the potential impact of "dramatic changes" is particularly critical given other proposed changes and regional service planning.

RESPONSE

The rule does not eliminate the transition period. Instead, the rule removes the five-year limit on the term of the transition period. The rule institutionalizes the transition and provides for a more stable funding environment. No change to the rule was made as a result of the comment.

COMMENT

Just Transportation Alliances stated its support of the proposed changes to the funding of the so-called "enclave cities," referring to the establishment of two funding tiers in the state urban program.

RESPONSE

No change to the rule was made as a result of this comment.

SUBCHAPTER B. STATE PROGRAMS

43 TAC §31.11

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and Transportation Code, §456.022, which requires the commission to adopt rules establishing a formula allocating funds among eligible public transportation providers.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 456.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603540
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: July 20, 2006
Proposal publication date: April 14, 2006
For further information, please call: (512) 463-8683

♦ ♦ ♦

SUBCHAPTER C. FEDERAL PROGRAMS

43 TAC §31.36

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and Transportation Code, §456.022, which requires the commission to adopt rules establishing a formula allocating funds among eligible public transportation providers.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 456.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 30, 2006.

TRD-200603541
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: July 20, 2006
Proposal publication date: April 14, 2006
For further information, please call: (512) 463-8683

♦ ♦ ♦

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Board of Nurse Examiners

Title 22, Part 11

The Board of Nurse Examiners will review and consider whether to re-adopt, re-adopt with amendments, or repeal Title 22 of the Texas Administrative Code, Part 11, Chapter 211, relating to General Provisions. This review is done pursuant to Texas Government Code §2001.039.

The Board will assess whether the reason(s) for adopting or re-adopting this chapter continues to exist. Each section of the chapter will be reviewed to determine whether it is obsolete, reflects current legal and policy considerations, reflects current general provisions in the governance of the Board, and/or whether it is in compliance with chapter 2001 of the Texas Government Code (Administrative Procedures Act).

Comments on the review may be submitted in writing within 30 days following the publication of this rule review in the *Texas Register* to Katherine Thomas, Executive Director, 333 Guadalupe, Ste. 3-460, Austin, Texas 78701. Any proposed changes to the sections of this chapter as a result of the review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption of any repeal, amendment, or re-adoption.

TRD-200603582
Katherine Thomas
Executive Director
Board of Nurse Examiners
Filed: July 3, 2006

♦ ♦ ♦

The Board of Nurse Examiners will review and consider whether to re-adopt, re-adopt with amendments, or repeal Title 22 of the Texas Administrative Code, Part 11, Chapter 213, relating to Practice and Procedure. This review is done pursuant to Texas Government Code §2001.039.

The Board will assess whether the reason(s) for adopting or re-adopting this chapter continues to exist. Each section of the chapter will be reviewed to determine whether it is obsolete, reflects current legal and policy considerations, reflects current procedures and practices of the Board, and/or whether it is in compliance with chapter 2001 of the Texas Government Code (Administrative Procedures Act). Various sections of this chapter are under review and if changes are determined to be needed, the Board will amend a section, or repeal a section and adopt a new section.

Comments on the review may be submitted in writing within 30 days following the publication of this rule review in the *Texas Register* to Katherine Thomas, Executive Director, 333 Guadalupe, Ste. 3-460, Austin, Texas 78701. Any proposed changes to the sections of this chapter as a result of the review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption of any repeal, amendment, or re-adoption.

TRD-200603583
Katherine Thomas
Executive Director
Board of Nurse Examiners
Filed: July 3, 2006

♦ ♦ ♦

The Board of Nurse Examiners will review and consider whether to re-adopt, re-adopt with amendments, or repeal Title 22 of the Texas Administrative Code, Part 11, Chapter 219, relating to Advanced Nurse Practitioner Program. This review is done pursuant to Texas Government Code §2001.039.

The Board will assess whether the reason(s) for adopting or re-adopting this chapter continues to exist. Each section of the chapter will be reviewed to determine whether it is obsolete, reflects current provisions relating to advanced educational programs that prepare either nurse practitioners or clinical nurse specialists, and/or whether it is in compliance with chapter 2001 of the Texas Government Code (Administrative Procedures Act).

Comments on the review may be submitted in writing within 30 days following the publication of this rule review in the *Texas Register* to Katherine Thomas, Executive Director, 333 Guadalupe, Ste. 3-460, Austin, Texas 78701. Any proposed changes to the sections of this chapter as a result of the review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption of any repeal, amendment, or re-adoption.

TRD-200603590
Katherine Thomas
Executive Director
Board of Nurse Examiners
Filed: July 3, 2006

♦ ♦ ♦

Adopted Rule Review

Texas Council on Purchasing from People with Disabilities

Title 40, Part 7

Pursuant to the notice of the proposed rule review published in the July 1, 2005, issue of the *Texas Register* (30 TexReg 3881), the Texas Council on Purchasing from People with Disabilities (Council) has reviewed and considered for readoption, revision, or repeal Title 40 of the Texas Administrative Code, Part 7, Chapter 189, Purchases of Products and Services from People with Disabilities, in accordance with the Texas Government Code §2001.039 (Vernon 2000).

The Council considered, among other things, whether the reasons for adoption of these rules continue to exist. No comments were received on the proposed rule review.

As a result of the review, the Council determined that the rules are still necessary and readopts without amendment 40 Texas Administrative Code §§189.1, 189.2, 189.3, 189.4, 189.5, 189.7, 189.8, 189.9, 189.10, 189.11, 189.12, and 189.13, because these provisions were promulgated to direct the implementation, extension, administration, and improvement of the programs of the Council authorized by Texas Human Resources Code Chapter 122; to direct the operation of the Council; and to comply with the mandate of the Texas Legislature concerning the Council's rulemaking authority. The Council further determined that 40 Texas Administrative Code §189.6, which governs the certification and re-certification of community rehabilitation programs, is also still necessary, but requires further substantive revision. Through a concurrent proposal, the Council readopts 40 Texas Administrative Code §189.6 with amendment.

These rules are readopted under the authority granted to the Council in Texas Human Resources Code, Sections 122.003(j) and 122.013 (Vernon Supp. 2005).

Cross reference to Statutes: Texas Human Resources Code, Chapter 122.

This completes the Council's review of 40 Tex. Admin. Code Chapter 189, Purchases of Products and Services from People with Disabilities.

TRD-200603558
John W. Luna
Chairman
Texas Council on Purchasing from People with Disabilities
Filed: June 30, 2006

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 22 TAC §1.232(j)

Violation	Rule(s) Cited	Recommended Penalty
Unauthorized duplication of certificate of registration or failure to display certificate of registration as required	Rule 1.62	Administrative penalty or reprimand
Practice of architecture while registration is inactive	Rule 1.68	Administrative penalty
Failure to fulfill mandatory continuing education requirements	Rule 1.69	Administrative penalty or suspension
Failure to use appropriate seal or signature	Rule 1.102 Rule 1.104(c)	Administrative penalty or reprimand
Failure to seal documents or insert statement in lieu of seal as required	Rule 1.103(a) Rule 1.103(d) Rule 1.103(f) Rule 1.103(h)(2) Rule 1.103(i) Rule 1.105(a)(4) Rule 1.122(c) Rule 1.122(e)	Administrative penalty or reprimand
Failure to mark incomplete documents as required	Rule 1.103(b)	Administrative penalty or reprimand
Removal of seal after issuance of documents	Rule 1.104(e) [~~1.103(e)~~]	Administrative penalty or reprimand
Failure to maintain a document for 10 years as required	Rule 1.103(g) Rule 1.105(b) Rule 1.122(d)	Administrative penalty or reprimand
Failure to notify the original design professional as required	Rule 1.103(h)(1)	Administrative penalty or reprimand
Sealing a document prepared by a person not working under the respondent's Supervision and Control	Rule 1.103(h)(3) Rule 1.104(a)	Suspension or revocation
Unauthorized use of a seal or modification of a document	Rule 1.104(b)	Administrative penalty or reprimand
Violation of requirements regarding prototypical design	Rule 1.105(a)(1) Rule 1.105(a)(2) Rule 1.105(a)(3) Rule 1.105(a)(5)	Administrative penalty, reprimand, or suspension

Failure to provide Statement of Jurisdiction	Rule 1.106	Administrative penalty or reprimand
Failure to enter into a written agreement of association when required	Rule 1.122	Administrative penalty or reprimand
Failure to exercise Supervision and Control over the preparation of a document as required	Rule 1.122(c)[~~(a)~~]	Suspension or revocation
Failure to exercise Responsible Charge over the preparation of a document as required	Rule 1.122(e)	Suspension or revocation
Failure to timely register a business entity or association as Principal thereof	Rule 1.124(a), (b), and (e)	Administrative penalty or reprimand
Failure to timely notify the Board upon dissolution of a business entity or association of loss of lawful authority to offer or provide architecture [~~ceasing to provide architectural services after filing an Architect of Record affidavit~~]	Rule 1.124(c)	Administrative penalty, reprimand, or suspension [~~or reprimand~~]
Gross incompetency	Rule 1.142	Suspension or revocation
Recklessness	Rule 1.143	Suspension or revocation
Dishonest practice	Rule 1.144(a) Rule 1.144(c)	Suspension or revocation
Dishonest practice	Rule 1.144(b)	Administrative penalty or reprimand
Conflict of interest	Rule 1.145	Suspension or revocation
Failure to uphold responsibilities to the architectural profession	Rule 1.146(a)	Suspension or revocation
Failure to uphold responsibilities to the architectural profession	Rule 1.146(b) Rule 1.146(c)	Administrative penalty or reprimand
Failure to act in a manner consistent with the Professional Services Procurement Act	Rule 1.147	Administrative penalty or reprimand
Unauthorized practice or use of title "architect"	Rule 1.148	Suspension, revocation, or denial
Criminal conviction	Rule 1.149	Suspension or revocation

Violation by Applicant	Rule 1.148 Rule 1.149 Rule 1.151	Reprimand, administrative penalty, suspension, rejection, denial of right to reapply
Failure to submit a document as required by the Architectural Barriers Act	Rule 1.170	Reprimand or administrative penalty
Failure to respond to a Board inquiry	Rule 1.171	Administrative penalty

Figure: 22 TAC §3.232(j)

Violation	Rule(s) Cited	Recommended Penalty
Unauthorized duplication of certificate of registration or failure to display certificate of registration as required	Rule 3.62	Administrative penalty or reprimand
Practice of landscape architecture while registration is inactive	Rule 3.68	Administrative penalty
Failure to fulfill mandatory continuing education requirements	Rule 3.69	Administrative penalty or suspension
Failure to use appropriate seal or signature	Rule 3.102 Rule 3.104(c)	Administrative penalty or reprimand
Failure to seal documents or insert statement in lieu of seal as required	Rule 3.103(a) Rule 3.103(d) Rule 3.103(f) Rule 3.103(h)(2) Rule 3.103(i) Rule 3.122(c) Rule 3.122(e)	Administrative penalty or reprimand
Failure to mark incomplete documents as required	Rule 3.103(b)	Administrative penalty or reprimand
Removal of seal after issuance of documents	Rule 3.104(e) [~~3.103(e)~~]	Administrative penalty or reprimand
Failure to maintain a document for 10 years as required	Rule 3.103(g) Rule 3.122(d)	Administrative penalty or reprimand
Failure to notify the original design professional as required	Rule 3.103(h)(1)	Administrative penalty or reprimand
Sealing a document prepared by a person not working under the respondent's Supervision and Control	Rule 3.103(h)(3) Rule 3.104(a)	Suspension or revocation
Unauthorized use of a seal or modification of a document	Rule 3.104(b)	Administrative penalty or reprimand
Failure to provide Statement of Jurisdiction	Rule 3.105	Administrative penalty or reprimand
Failure to report a course of action taken against the respondent's advice as required	Rule 3.105(b)	Administrative penalty, reprimand, or suspension
Failure to enter into a written agreement of association when required	Rule 3.122	Administrative penalty or reprimand
Failure to exercise Supervision and Control over the preparation of a document as required	Rule 3.122(c)[~~(a)~~]	Suspension or revocation

Failure to exercise Responsible Charge over the preparation of a document as required	Rule 3.122(e)	Suspension or revocation
Failure to timely register a business entity or association as Principal thereof	Rule 3.124(a), (b), and (e)	Administrative penalty or reprimand
Failure to timely notify the Board upon dissolution of a business entity or association of loss of lawful authority to offer or provide landscape architecture [~~ceasing to provide landscape architectural services after filing a Landscape Architect of Record affidavit~~]	Rule 3.124(c)	Administrative penalty, reprimand, or suspension [~~or reprimand~~]
Gross incompetency	Rule 3.142	Suspension or revocation
Recklessness	Rule 3.143	Suspension or revocation
Dishonest practice	Rule 3.144(a) Rule 3.144(c)	Suspension or revocation
Dishonest practice	Rule 3.144(b)	Administrative penalty or reprimand
Conflict of interest	Rule 3.145	Suspension or revocation
Failure to uphold responsibilities to the landscape architectural profession	Rule 3.146(a)	Suspension or revocation
Failure to uphold responsibilities to the landscape architectural profession	Rule 3.146(b) Rule 3.146(c)	Administrative penalty or reprimand
Failure to act in a manner consistent with the Professional Services Procurement Act	Rule 3.147	Administrative penalty or reprimand
Unauthorized practice or use of title "landscape architect"	Rule 3.148	Suspension, revocation, or denial
Criminal conviction	Rule 3.149	Suspension or revocation
Violation by Applicant	Rule 3.148 Rule 3.149 Rule 3.151	Reprimand, administrative penalty, suspension, rejection, denial of right to reapply
Failure to submit a document as required by the Architectural Barriers Act	Rule 3.170	Reprimand or administrative penalty
Failure to respond to a Board inquiry	Rule 3.171	Administrative penalty

Figure: 22 TAC §5.242(j)

Violation	Rule(s) Cited	Recommended Penalty
Unauthorized duplication of certificate of registration or failure to display certificate of registration as required	Rule 5.72	Administrative penalty or reprimand
Practice of interior design while registration is inactive	Rule 5.78	Administrative penalty
Failure to fulfill mandatory continuing education requirements	Rule 5.79	Administrative penalty or suspension
Failure to use appropriate seal or signature	Rule 5.112 Rule 5.114(c)	Administrative penalty or reprimand
Failure to seal documents or insert statement in lieu of seal as required	Rule 5.113(a) Rule 5.113(d) Rule 5.113(f) Rule 5.113(h)(2) Rule 5.113(i) Rule 5.132(c) Rule 5.132(e)	Administrative penalty or reprimand
Failure to mark incomplete documents as required	Rule 5.113(b)	Administrative penalty or reprimand
Removal of seal after issuance of documents	Rule 5.114(e) [~~5.113(e)~~]	Administrative penalty or reprimand
Failure to maintain a document for 10 years as required	Rule 5.113(g) Rule 5.132(d)	Administrative penalty or reprimand
Failure to notify the original design professional as required	Rule 5.113(h)(1)	Administrative penalty or reprimand
Sealing a document prepared by a person not working under the respondent's Supervision and Control	Rule 5.113(h)(3) Rule 5.114(a)	Suspension or revocation
Unauthorized use of a seal or modification of a document	Rule 5.114(b)	Administrative penalty or reprimand
Failure to provide Statement of Jurisdiction	Rule 5.115(a)	Administrative penalty or reprimand
Failure to report a course of action taken against the respondent's advice as required	Rule 5.115(b)	Administrative penalty, reprimand, or suspension
Failure to enter into a written agreement of association when required	Rule 5.132	Administrative penalty or reprimand

Failure to exercise Supervision and Control over the preparation of a document as Required	Rule 5.132(c)[~~(a)~~]	Suspension or revocation
Failure to exercise Responsible Charge over the preparation of a document as required	Rule 5.132(e)	Suspension or revocation
Failure to timely register a business entity or association as Principal thereof	Rule 5.134(a), (b), and (e)	Administrative penalty or reprimand
Failure to timely notify the Board upon dissolution of a business entity or association or upon loss of the entity or association to use the title "interior designer" and the term "interior design" [~~ceasing to provide interior design services after filing an Interior Designer of Record affidavit~~]	Rule 5.134(d)[~~(c)~~]	Administrative penalty, reprimand, or suspension [~~or reprimand~~]
Gross incompetency	Rule 5.152	Suspension or revocation
Recklessness	Rule 5.153	Suspension or revocation
Dishonest practice	Rule 5.154(a) Rule 5.154(c)	Suspension or revocation
Dishonest practice	Rule 5.154(b)	Administrative penalty or reprimand
Conflict of interest	Rule 5.155	Suspension or revocation
Failure to uphold responsibilities to the interior design profession	Rule 5.156(a)	Suspension or revocation
Failure to uphold responsibilities to the interior design profession	Rule 5.156(b) Rule 5.156(c)	Administrative penalty or reprimand
Unauthorized practice or use of title "interior designer" or term "interior design"	Rule 5.157	Suspension, revocation, or denial
Criminal conviction	Rule 5.158	Suspension or revocation
Violation by Applicant	Rule 5.157 Rule 5.158 Rule 5.160	Reprimand, administrative penalty, suspension, rejection, denial of right to reapply
Failure to submit a document as required by the Architectural Barriers Act	Rule 5.180	Reprimand or administrative penalty
Failure to respond to a Board inquiry	Rule 5.181	Administrative penalty

Figure: 22 TAC §577.15

(a) EXAMINATIONS	FEE
Texas State Board Licensing Exam (SBE)	$155
Special License	$155
(b) APPLICATION PROCESSING (except for Provisional License)	$50

(c) RENEWALS	BOARD FEE	PROF. FEE	TOTAL FEE
License Renewal (current)	$128 [~~$123~~]	$200	$328 [~~$323~~]
Delinquent Renewals (90 days or less)	$192 [~~$185~~]	$200	$392 [~~$385~~]
Delinquent Renewals (over 90 days but less than one year)	$256 [~~$246~~]	$200	$456 [~~$446~~]
Inactive Renewals	$128 [~~$123~~]	$0	$128 [~~$123~~]
Delinquent Inactive Renewal (90 days or less)	$192 [~~$185~~]	$0	$192 [~~$185~~]
Delinquent Inactive Renewals (over 90 days but less than one year)	$256 [~~$246~~]	$0	$256 [~~$246~~]
Special License	$123 [~~$118~~]	$200	$323 [~~$318~~]
Delinquent Special License Renewals (90 days or less)	$185 [~~$177~~]	$200	$385 [~~$377~~]
Delinquent Special License Renewals (over 90 days but less than one year)	$246 [~~$236~~]	$200	$446 [~~$436~~]
(d) PROVISIONAL LICENSE	$255	$0	$255

(e) OPEN RECORDS
Charges for all open records and other goods/services such as tapes, disks, will be in accordance with Texas Building and Procurement Commission 1 TAC §§111.61 - 111.71 --"Charges for Public Records"

(f) RETURNED CHECK FEE	$25

Figure: 43 TAC §18.16(a)

Type of Vehicle	Minimum Insurance Level
1. Tow trucks and household goods carriers (gross vehicle weight less than 26,000 lbs.).	$300,000
2. Buses designed or used to transport more than 15 passengers (including the driver), but fewer than 26 passengers (not including the driver).	$500,000
3. Commercial motor vehicles which are buses with a seating capacity of 15 passengers or fewer (including the driver) operated by a foreign motor carrier and foreign motor private carrier as defined in 49 USC §13102.	$1,500,000
4. Buses designed or used to transport 26 passengers or more (not including the driver).	$5,000,000
5. Commercial school buses, regardless of the passenger capacity as described in Transportation Code, §643.1015.	$500,000
6. Commercial motor vehicles that are buses with a seating capacity of 16 passengers or more (including the driver) operated by a foreign motor carrier or foreign motor private carrier as defined in 49 USC §13102.	$5,000,000
7. Farm trucks (gross vehicle weight 48,000 lbs. or more).	$500,000
8. Commercial motor vehicles (gross vehicle weight in excess of 26,000 lbs.), including tow trucks.	$500,000
9. Commercial motor vehicles, as defined in 49 CFR §390.5, operated by a foreign motor carrier or foreign motor private carrier as defined in 49 USC §13102.	$750,000
10. Commercial motor vehicles - Oil listed in 49 CFR §172.101; hazardous waste, hazardous materials and hazardous substances defined in 49 CFR §171.8 and listed in 49 CFR §172.101, but not mentioned in item 10 of this table.	$1,000,000
11. Commercial motor vehicles - Hazardous substances, as defined in 49 CFR §171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons; or any quantity of Division 1.1, 1.2, and 1.3 materials, any quantity of Division 2.3, Hazard Zone A material; in bulk Division 2.1 or 2.2; or highway route controlled quantities of a Class 7 material, as defined in 49 CFR §173.403.	$5,000,000

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of the Attorney General

Texas Health and Safety Code Settlement Notice

Notice is hereby given by the State of Texas of the following proposed revisions to the injunctive portions of a judgment rendered in a lawsuit brought under the Texas Health and Safety Code. Before the State may settle a judicial enforcement action under the Health and Safety Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: ***State of Texas v. La Joya Water Supply Corp.*, Cause No. GV400991; in the 53rd Judicial District Court, Travis County, Texas.**

Nature of Defendant's Operations: Defendant operates a public drinking water system in Hidalgo and Starr Counties of Texas. Defendant's public drinking water system serves approximately 12,000 residents. The State initiated the suit to enforce the rules of the TCEQ regarding the operation public drinking water systems. On April 29, 2004, the parties entered an Agreed Final Judgment, which provides for a permanent injunction ordering the Defendant to improve the system.

Proposed Modified Agreed Final Judgment: The parties now seek to file An Agreed Final Judgment and Modified Permanent Injunction, which allows the Defendant to utilize other means to come into compliance with State law and improve its system. It also extends the deadlines set forth in the 2004 Agreed Judgment, but it makes the requirements for compliance clearer than they were in the 2004 Agreed Judgment. This new Agreed Final Judgment and Modified Permanent Injunction retains the same civil penalties as the 2004 Agreed Judgment, payable unless certain tasks are completed in a timely manner, using the new requirements and deadlines. This Judgment also acknowledges that Defendant has already paid $30,000 in civil penalties and attorney's fees of $15,000.00, as assessed in the original Agreed Final Judgment.

For a complete description of the proposed settlement, the complete proposed Modified Agreed Final Judgment and Permanent Injunction should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement, should be directed to Lisa Sanders Richardson, Assistant Attorney General, Office of the Texas Attorney General, P. O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

For information regarding this publication, contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.

TRD-200603572
Stacey Schiff
Deputy Attorney General
Office of the Attorney General
Filed: June 30, 2006

♦ ♦ ♦

Texas Building and Procurement Commission

Invitation for Bid

TBPC Project No. 06-036-7209

Project Name: Replace Rooftop Units, Human Services Warehouse, 1111 West North Loop, Austin, Texas 78756, for the Texas Building and Procurement Commission (TBPC)

Sealed Bids for this project will be received until 3:00 PM, July 26, 2006, at the Bid Room, Room 100, 1711 San Jacinto, Austin, Texas 78701. See the Invitation for Bid (IFB) for other delivery choices.

Plans and specifications may be obtained from the A/E, PBS&J Architecture, 1120 Capital of Texas Highway, South, Building 3, Suite 100, San Antonio, Texas 78746, Phone: (512) 328-9551, Fax: (512) 328-9557, for a deposit of $50.00, refundable upon return of a complete, unmarked set(s).

PRE-BID CONFERENCE AND SITE REVISIT: The non-mandatory pre-bid conference is scheduled for July 13, 2006 at 10:00 AM. The follow up revisit to the site is scheduled for July 18, 2006 at 9:00 AM. Attendance to the pre-bid conference or the site visit is highly recommended. *Location of the pre-bid conference and site visit is the Human Services Warehouse, 1111 W. North Loop, Austin.* Report to the dock on the south side of the building. Parking is available in the parking lot to the west and north of the warehouse.

Only bids submitted on the official CONTRACTOR'S BID FORM found in the Project Manual or the IFB will be accepted.

The IFB may be obtained by contacting TBPC Internal Procurement, Attention: John Goodrich (Fax: (512) 236-6164), john.goodrich@tbpc.state.tx.us or through the Electronic State Business Daily at: http://esbd.tbpc.state.tx.us/1380/bid_show.cfm?bidid=65810

No oral explanation in regard to the meaning of the Drawings and Specifications will be made and no oral instructions will be given before the award of the Contract. Discrepancies, omissions or doubts as to the meaning of Drawings and Specifications and all communications concerning the project shall be communicated in writing to the contact and numbers above for interpretation. Bidders should act promptly and allow sufficient time for a reply to reach them before the submission of their Bids. Any interpretation made will be in the form of an addendum to the Specifications, which will be forwarded to all known Bidders and its receipt by the Bidder shall be acknowledged on the Contractor's Bid Form or on the face of the Addendum and returned with the bid.

TRD-200603528
Ingrid K. Hansen
General Counsel
Texas Building and Procurement Commission
Filed: June 29, 2006

♦ ♦ ♦

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of June 23, 2006, through June 29, 2006. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on July 5, 2006. The public comment period for these projects will close at 5:00 p.m. on August 4, 2006.

FEDERAL AGENCY ACTIONS:

Applicant: Hoxie Development, Ltd; Location: The project is located immediately north of the FM 2031 and Gulf Intracoastal Waterway intersection, in Matagorda, Matagorda County, Texas. The proposed borrow area is located north of South Gulf Road, approximately 1.3 miles northeast of the project area. The project can be located on the U.S.G.S. quadrangle map entitled: Matagorda, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 210253; Northing: 3176926 (Project Site). Zone 15; Easting: 212031; Northing: 3178602 (Borrow Site). Project Description: The applicant proposes to construct a waterfront residential development community that provides residents access to the area's water resources. Specifically, the applicant proposes to replace 986 linear feet of existing bulkheads and construct approximately 1,814 linear feet of new bulkheads, construct approximately 45 residential lots and new access roads on an 18.7-acre tract with existing excavated canals. The applicant plans to excavate approximately 16,796 cubic yards of silt and clay material from 3.87 acres of existing canals (open water), fill 0.82 acre of open water within the existing excavated canals, dredge 0.094 acre of wetlands contiguous with the existing canals, and fill 0.07 acre of wetlands contiguous with the existing canals. A mechanical dredge would be used for all the dredge work and the material would be placed behind the Matagorda ring levee to raise and level the on-site lots in that area. Additionally, the applicant proposes to fill 0.38 acre of wetlands adjacent to the Gulf Intracoastal Waterway and impact 0.30 acre of oysters by filling or dredging. The applicant also proposes to construct a boat ramp (26' x 40') and construct 45 boat shelters that would extend 40 feet from the canal banks. For mitigation, the applicant proposes to avoid 0.14 acre of wetlands adjacent to the GIWW, 3.0 acres of open water and 0.08 acre of oysters (on site). Furthermore, the applicant proposes to construct 0.981 acre of tidal fringe wetlands/shallow water habitat on site, of which approximately 0.6 acre would be tidal fringe wetlands. The shallow water habitat is expected to be naturally colonized by oysters or additional tidal fringe wetlands (on site). CCC Project No.: 06-0336-F1; Type of Application: U.S.A.C.E. permit application #24133 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act.

Applicant: Freeport LNG Development, L.P.; Location: The project is located at on Quintana Island in Brazoria County, Texas, along the Freeport Harbor Channel (Channel) and the Gulf Intracoastal Waterway (GIWW). The project can be located on the U.S.G.S. quadrangle map entitled: Freeport, Texas. Approximate UTM Coordinates: Zone 15; Easting: 275192; Northing: 3203304. Project Description: The applicant, Freeport LNG Development, L.P., is requesting authorization to amend Department of the Army Permit Number 23078 to expand their previously authorized facility. Expansion includes the addition of a second marine berthing dock and associated unloading facilities for ships transporting liquefied natural gas (LNG) at the existing Freeport LNG Terminal Facility. In addition to the second dock and unloading facilities, the applicant will also construct new and expanded vaporization systems and an additional LNG storage tank on the property. At the Stratton Ridge site, located approximately 9 miles north of the project area, the applicant proposes to expand the existing storage facility to accommodate the increased amount of LNG that will be transported through the area. All of the proposed additional facilities will be constructed within or immediately adjacent to the boundary of the previously authorized facilities. A second unloading dock is proposed. This dock will be located west and opposite of the previously authorized dock, at the northeast end of the terminal facility. The second unloading dock will be designed to accommodate ships with capacities from 88,000 cubic meters to 250,000 cubic meters. The proposed berthing area for both docks will be approximately 1,880 feet wide at its entrance and will have 3:1 side slopes. Simultaneous unloading at both docks will accommodate up to 400 ships per year. The jetty platform associated with the new dock will be a single-level reinforced concrete beam and slab structure supported on piles and measuring approximately 100 feet long by 90 feet wide. A 30-foot by 45-foot extension will support the jetty control building. Four additional breasting dolphins are also proposed. The dolphins will consist of reinforced concrete structures on piles and will be equipped with fenders suitable for safely berthing and mooring the full range of ships under consideration. Catwalks will be constructed to connect the breasting dolphins with to the unloading dock and mooring dolphins. Six mooring dolphins will be constructed consisting of reinforced concrete caps supported on steel piles. The slabs will be 29 feet long by 15 feet wide. Dredging operations associated with the second dock will be closely aligned with those currently authorized for the original dock. The berthing area will be dredged perpendicular to the Freeport Harbor Channel to a depth of -46.5 feet (NAVD 88) with a 2-foot allowable overdepth. The end of the slip will be 2,200 feet from the near bottom edge of the ship channel. Construction of the second dock will involve the hydraulic dredging of approximately 754,000 cubic yards of material. This material will be discharged in one or more of the Port of Freeport's Dredged Material Placement Areas currently authorized by the existing permit. Construction of the second dock will result in the creation of 13.93 acres of open water habitat. Construction of the second unloading dock and associated facilities at the Quintana Island site will result in permanent impacts to 4.38 acres of estuarine wetland habitat. These impacts were originally characterized as temporary (for the original authorization). In addition, 2.59 acres of previously un-impacted estuarine wetlands would now be permanently impacted and the restoration of 1.52 acres of temporarily impacted wetlands would be delayed as a result of ongoing construction activities on the site. In all, a total of 6.97 acres of estuarine wetlands and 1.78 acres of open water habitat would be permanently impacted as a result of the expansion of the Freeport LNG Terminal Facility. In addition to the impacts associated with the construction of the second dock and additional onsite facilities, 0.50 acre of palustrine wetlands at the Stratton Ridge Underground Storage Site will be permanently affected. Additional temporary impacts associated with construction activities near the Stratton Ridge site may also occur. There are no new impacts associated with the installation and maintenance of a 42-inch send-out pipeline (previously authorized). To compensate for impacts to the aquatic environment associated with the Freeport LNG Development, L.P. expansion project, the applicant proposes to place seven, 5-acre tracts of land, located along the pipeline

route, into a conservation easement. Temporarily impacted wetland areas will be restored per the original mitigation plan dated December 2004. Permit 23078 was issued on 30 December 2004 and authorized the construction, operation, and maintenance of a liquefied natural gas receiving and transportation facility consisting of a marine terminal, storage and vaporization facility, pipeline, and associated electric utility line. Amendment (01) was issued on 10 April 2005, and authorized the construction of a temporary barge dock to offload sand and aggregate materials necessary to facilitate the construction of the Freeport LNG Terminal Facility. The original permit authorized the installation of a 36-inch-diameter pipeline. However, since the permit was issued, the pipeline diameter has been increased to 42 inches. Amendment (02) was issued on 7 March 2006, and authorized temporary and permanent impacts to waters of the United States associated with minor modifications to the previously permitted pipeline route. Amendment (03) (pending) reflects a request to: 1) add scour protection at the previously permitted Marine Terminal Berthing Area; 2) remove an existing FOC dock facility; 3) construct a temporary low-water crossing on the north side of the terminal facility; and 4) install open-celled articulated block matting in a portion of the mitigation area to prevent erosion. Amendment (04) (pending) involves a partial permit transfer to remove the permitted electric transmission line from the authorization. CCC Project No.: 06-0340-F1; Type of Application: U.S.A.C.E. permit application #23078(05) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Railroad Commission under §401 of the Clean Water Act.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200603611
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: July 5, 2006

♦ ♦ ♦

Comptroller of Public Accounts

Notice of Award

Pursuant to Chapters 403 and 404 Texas Government Code; the Comptroller of Public Accounts (Comptroller) announces under its Request for Proposals RFP (175h) the award of the following contract:

A contract is awarded to JPMorgan Chase Bank, N.A., 221 West 6th St., Austin, Texas 78701 (Contractor). The total contract amount is dependent on usage of automated clearing house services by state agencies.

The Comptroller's Request for Proposals 175h (RFP) related to this contract award was published in the April 7, 2006, *Texas Register* (31 TexReg 3077).

The term of the contract is September 1, 2006 through August 31, 2009 and may be extended one (1) time for one (1) year.

TRD-200603532
William Clay Harris
General Counsel, Contracts
Comptroller of Public Accounts
Filed: June 30, 2006

♦ ♦ ♦

Notice of Award

Pursuant to Chapter 2107, §2107.003, Texas Government Code; the Comptroller of Public Accounts (Comptroller) announces under its Request for Proposals RFP (175j) the award of the following contract:

A contract is awarded to OSI Collection Services, Inc., 800 Wilcrest, Suite 300, Houston, Texas 77042 (Contractor). The total contract amount is based on a percentage of the amounts collected on delinquent tax accounts referred to the Contractor. No minimum amount is guaranteed.

The Comptroller's Request for Proposals 175j (RFP) related to this contract award was published in the March 31, 2006, *Texas Register* (31 TexReg 2898).

The term of the contract is September 1, 2006 through August 31, 2008 and may be extended two (2) times for one (1) year at a time.

TRD-200603571
William Clay Harris
General Counsel, Contracts
Comptroller of Public Accounts
Filed: June 30, 2006

♦ ♦ ♦

Notice of Contract Amendment

Pursuant to Chapter 403, Chapter 2254, Subchapter A, Texas Government Code, and Chapter 111 Texas Tax Code, the Comptroller of Public Accounts (Comptroller) announces this notice of amendment of existing Master Agreement for Professional Services (Master Agreement) between the following Contractors and the Comptroller resulting from RFQ 172k.

Effective in September 2005, the Comptroller, and the Contractors entered into Master Agreements for Professional Services resulting from RFQ 172k. The initial term of the Master Agreement was from September 2005 through August 31, 2006. The Master Agreements listed below were amended in June, 2006 in order to extend their terms from their original termination date on August 31, 2006 until August 31, 2007. The Master Agreements, by their terms, allow for a single one-year only extension of the Master Agreements. The six (6) amendments below reflect the exercise by the Comptroller of the only one (1) one-year extension available under the Master Agreement.

The Comptroller announces that six (6) Master Agreements were amended as follows:

Contract amendment with Charles F. Hobbs, 3830 FM 967, Buda, TX 78610. Examinations will be assigned in $60,000, $75,000 or $90,000 increments or packages but no contract examiner shall have examination packages totaling more than $150,000 in fees during any one state fiscal year during the contract term or any extension thereof. The term of the Master Agreement is extended from its current expiration on August 31, 2006 until August 31, 2007.

Contract amendment with The JSO Group, Inc., 11610 Aucuba Lane, Houston, TX 77095. Examinations will be assigned in $60,000, $75,000 or $90,000 increments or packages but no contract examiner shall have examination packages totaling more than $150,000 in

fees during any one state fiscal year during the contract term or any extension thereof. The term of the Master Agreement is extended from its current expiration on August 31, 2006 until August 31, 2007.

Contract amendment with Raymond Peterson & Associates, 5787 Hampton Rd. 305, Dallas, TX 75232-2255. Examinations will be assigned in $60,000, $75,000 or $90,000 increments or packages but no contract examiner shall have examination packages totaling more than $150,000 in fees during any one state fiscal year during the contract term or any extension thereof. The term of the Master Agreement is extended from its current expiration on August 31, 2006 until August 31, 2007.

Contract amendment with Stephen T. Broad, 1218 Gordon Blvd., San Angelo, TX 76905. Examinations will be assigned in $60,000, $75,000 or $90,000 increments or packages but no contract examiner shall have examination packages totaling more than $150,000 in fees during any one state fiscal year during the contract term or any extension thereof. The term of the Master Agreement is extended from its current expiration on August 31, 2006 until August 31, 2007.

Contract amendment with Vernice Seriale, Jr., 11612 Cross Spring Dr., Pearland, TX 77584. Examinations will be assigned in $60,000, $75,000 or $90,000 increments or packages but no contract examiner shall have examination packages totaling more than $150,000 in fees during any one state fiscal year during the contract term or any extension thereof. The term of the Master Agreement is extended from its current expiration on August 31, 2006 until August 31, 2007.

Contract amendment with Morgan, Spencer & Co., 1301 Stapleton St., Flower Mound, TX 75028. Examinations will be assigned in $60,000, $75,000 or $90,000 increments or packages but no contract examiner shall have examination packages totaling more than $150,000 in fees during any one state fiscal year during the contract term or any extension thereof. The term of the Master Agreement is extended from its current expiration on August 31, 2006 until August 31, 2007.

TRD-200603588
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: July 3, 2006

♦ ♦ ♦

Notice of Contract Amendment

Pursuant to Chapter 403 and Chapter 2155, Section 2155.083, Texas Government Code and Chapter 111, and Section 111.0045, Texas Tax Code the Comptroller of Public Accounts (Comptroller) announces this notice of amendment of the existing Master Agreement for Professional Services (Master Agreement) between the following Contractors and the Comptroller resulting from RFQ 167h.

Effective either May or June 2004 as applicable, the Comptroller, and the Contractors entered into Master Agreements for Professional Services resulting from RFQ 167h. The initial term of the Master Agreement was from either May or June 2004 through August 31, 2005. The Master Agreements were amended in August, 2005 in order to extend their terms from the initial termination date on August 31, 2005 until August 31, 2006. The Master Agreements listed below were amended in June, 2006 in order to extend their terms from the extended termination date on August 31, 2006 until August 31, 2007. The Master Agreements, by their terms, allow for one-year extensions of the Master Agreements to be exercised one year at a time. The twenty-six (26) amendments below reflect the exercise of the second and last of two (2) such one-year extensions. The Comptroller intends to post further notices of amendment for additional contract amendments now pending. For further information, please contact: Pamela Smith, Deputy General Counsel for Contracts, Comptroller of Public Accounts, 111 E. 17th St., ROOM G-24, Austin, Texas 78774, telephone number: (512) 475-0498, fax: (512) 475-0973, or by e-mail at contracts@cpa.state.tx.us.

Contract Amendment with Stacie Sims, CPA, 205 Rolling Hill Dr., La Grange, Texas 78945. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with David Perry, 6010 Ogden Forest, Houston, Texas 77088. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Art Koenings, Jr., CPA, 15712 Spillman Ranch Loop, Austin, Texas 78738. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Ruzicka-Reed Partnership, 1555 Glenhill Ln., Lewisville, Texas 75077. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Audit Consulting, LP, 8617 Davis Boulevard, Fort Worth, Texas 76180. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Jennifer L. Wilmoth, 1142 Stratborough Ln, Fort Collins, Colorado 80525. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Jodie Moore, 15822 Ridgerock Road, Missouri City, Texas 77489. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with David Kasen, 634 10th. Street #1F, Brooklyn, New York 11215. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Joe Wamp, 5834 Mapleshade Ln., Dallas, Texas 75252. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Brenda Maldonado, 2095 Savannah Trace, Beaumont, Texas 77706. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Gonzalez & Arrambide, Inc. 410 S. International Blvd., Weslaco, Texas 78596. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Honorio Eugenio, 6108 Pinehurst, El Paso, Texas 79912. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with D. Smith Consulting, 418 Sonora Dr., Garland, Texas 75042. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its initial termination on August 31, 2005 until August 31, 2006.

Contract Amendment with Louis A. Sanchez, 2314 Woodwind Dr., Richmond, Texas 77469. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its initial termination on August 31, 2005 until August 31, 2006.

Contract Amendment with Christy Gokeler, 9327 Pearsall Drive, Houston, Texas 77064. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its initial termination on August 31, 2005 until August 31, 2006.

Contract Amendment with Blythe Corporation, 3002 Sugar Maple, Friendswood, Texas 77546. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Cherise D. Collins, 17011 Driver Ln., Sugar Land, Texas 77478. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Dibrell P. Dobbs d/b/a State Tax Consulting Group, Timber Gardens Court, Arlington, Texas 76016. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Tarrant & Bulgherini, PC, 7109 Yucca Dr., Galveston, Texas 77551-1725. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Nicole Y. Thomas, 5414 Cactus Forest, Houston, Texas 77008. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with AJM State Tax Consulting, 6912 La Cadena, El Paso, Texas 79912. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Ruby Veronica Barnes, 10120 Tantarra Dr., Burleson, Texas 76028. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Davis & Davis Professional Services Firm, 3920 Willowbend Drive, The Colony, Texas 75056. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Kelton Brown, 3002-58th. Street, Lubbock, Texas 79413. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Marsha Johnson, Inc., 6205 Westwood Drive, Amarillo, Texas 79124. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

Contract Amendment with Erica Powell d/b/a ELP Financial, 8410 Spotsylvaina, Houston, Texas 77083. Examinations may be assigned in $60,000 or $75,000, increments or packages but no contract examiner shall have more than $300,000 in fees from examination packages at any one time during the Master Agreement term as extended. The term of the Master Agreement is extended from its extended termination on August 31, 2006 until August 31, 2007.

TRD-200603589
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: July 3, 2006

♦ ♦ ♦

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003 and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 07/10/06 - 07/16/06 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 07/10/06 - 07/16/06 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-200603609
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: July 5, 2006

♦ ♦ ♦

East Texas Council of Governments

Request for Applications for Emergency Disaster Relief

Public Notice

The Texas Health and Human Services Commission has awarded the East Texas Council of Governments (ETCOG) a Social Services Block Grant (Grant) for Emergency Disaster Relief. A portion of these funds may be used to reimburse local organizations for expenses incurred in providing certain allowable health and human services to individuals affected by Hurricane Rita. These expenses must not have been reimbursed through any other state or federal government source. These services must have been provided to individuals located in one of the following six counties: Gregg, Harrison, Panola, Marion, Cherokee, or Rusk. It is also possible that additional grant funds will become available to reimburse these local organizations for expenses incurred in providing certain allowable health and human services to individuals affected by Hurricane Katrina that have not been reimbursed through any other state or federal source. To apply for reimbursement, a local organization must submit an Application for Reimbursement. ETCOG is, therefore, soliciting Applications for Reimbursement from interested area organizations.

In releasing this Request for Applications, ETCOG is not making a commitment to any organization to reimburse the expenses identified. The contract period for the use of the grant funds is from October 1, 2005, to September 30, 2007. The total amount of grant funds available through the contract is $1 million, of which no more than $950,000 may be made available to reimburse applying organizations. The grant funds will be financed 100 percent with federal funds.

Requests for Applications will not be released before June 30, 2006. The deadline for the receipt of requests will be Monday, July 24, 2006.

Organizations wanting to receive a Request for Application (RFA) package should send a request by letter, e-mail or fax. Request letters should be addressed to Russell Rowe, FEMA Project Coordinator, East Texas Council of Governments, 3800 Stone Road, Kilgore, TX 75662 or e-mail to russelldrowe@yahoo.com or fax at (903) 984-4482, Attention: Russell Rowe.

There will be an Informational Conference regarding the RFA at 1:30 p.m. July 12 at East Texas Council of Governments, 3800 Stone Road, Kilgore. Questions concerning the RFA process should be addressed by e-mail or fax to Russell Rowe, FEMA Project Coordinator, at russelldrowe@yahoo.com or fax at (903) 984-4482, Attention: Russell Rowe.

Historically Underutilized Businesses as well as organizations such as non-profit organizations, faith-based organizations, community-based organizations, educational organizations, and city and county governments are encouraged to submit applications. All programs of ETCOG are equal opportunity entities. Auxiliary aids and services are available, upon request, to those with disabilities. 1-800-735-2988 VOICE, 1-800-735-2989 TDD.

TRD-200603594
Glynn Knight
Executive Director
East Texas Council of Governments
Filed: July 5, 2006

♦ ♦ ♦

Texas Commission on Environmental Quality

Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 14, 2006**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate a proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the appli-

cable regional office listed as follows. Comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 14, 2006**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, comments on the DOs should be submitted to the commission in **writing**.

(1) COMPANY: A.K.S. Construction L.P.; DOCKET NUMBER: 2005-0966-AIR-E; TCEQ ID NUMBER: RN104155197; LOCATION: north of State Highway 242 and east of Gleneagle Drive at the end of Condor Drive, Conroe, Montgomery County, Texas; TYPE OF FACILITY: two portable air curtain incinerators (ACI); RULES VIOLATED: 30 TAC §§101.4, 106.496(c)(4)(B), and 111.201 and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent nuisance conditions caused by the presence of soot and ash from unauthorized outdoor burning around houses in the Gleneagles Subdivision located adjacent to the site; 30 TAC §106.496(c)(3)(B), (C), (D), and (E) and THSC, §382.085(b), by failing to comply with ACI operational limits; 30 TAC §116.110(a)(4) and THSC, §382.085(b), by failing to obtain a permit by rule for an unauthorized ACI that was in operation on October 4, 2004; 30 TAC §205.6 and TWC, §5.702, by failing to pay general permits stormwater fees and associated late fees for Fiscal Year 2005; PENALTY: $15,000; STAFF ATTORNEY: Mark Curnutt, Litigation Division, MC 175, (512) 239-0624; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Crest Enterprises, Inc. dba Chevron Mart; DOCKET NUMBER: 2003-0240-PST- E; TCEQ ID NUMBER: RN101566412; LOCATION: 3544 East 14th Street, Plano, Collin County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks (USTs); 30 TAC §334.50(b)(2), by failing to maintain records as required to demonstrate proper release detection for the product piping associated with all UST systems; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to conduct a pressure decay test during the twelve-month period preceding the inspection and failing to verify proper operation of the Stage II equipment at least once every five years; PENALTY: $6,500; STAFF ATTORNEY: Robert Mosley, Litigation Division MC 175, (512) 239-0627; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Jason Beam dba Case By Case; DOCKET NUMBER: 2005-1885-AIR-E; TCEQ ID NUMBER: RN104599972; LOCATION: 1315 Chemical Street, Dallas, Dallas County, Texas; TYPE OF FACILITY: furniture building plant; RULES VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to obtain a permit or meeting the requirements of a permit by rule for a spray coat painting operation; 30 TAC §101.4 and THSC, §382.085(a) and (b), by creating a nuisance condition at the plant due to excessive and offensive paint odors leaving the property; PENALTY: $2,100; STAFF ATTORNEY: Deanna Sigman, Litigation Division, MC 175, (512) 239-0619; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Jopa Sports & Entertainment, Inc.; DOCKET NUMBER: 2005-1826-PWS-E; TCEQ ID NUMBER: RN101272391; LOCATION: 17951 I-45 South, Conroe, Montgomery County, Texas; TYPE OF FACILITY: public water supply system; RULES VIOLATED: 30 TAC §290.109(2)(A)(i) and THSC, §341.033(d), by failing to collect routine bacteriological samples for the months of April - September, November, and December of 2004, and February and July of 2005; 30 TAC §290.122(c)(2)(B), by failing to notify persons served by the facility of its failure to collect routine bacteriological samples; PENALTY: $3,625; STAFF ATTORNEY: Shana Horton, Litigation Division, MC 175, (512) 239-1088; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: Metroplex Lucky Star, LLC dba Coastal 1; DOCKET NUMBER: 2005-0649-PST- E; TCEQ ID NUMBER: RN101560977; LOCATION: 1400 South Armstrong Avenue, Denison, Grayson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(c)(4)(C) and TWC, §26.3475(d), by failing to inspect and test the corrosion protection system once every three years after installation; 30 TAC §334.50(b)(2) and (b)(2)(A)(i) and TWC, §26.3475(a) and (c)(1), by failing to monitor the USTs pressurized piping for releases and equip the mid-grade product line with an automatic line leak detector; 30 TAC §334.8(c)(5)(A)(i), by failing to make available to a common carrier a valid, current delivery certificate before delivery of a regulated substance into the USTs; 30 TAC §334.8(c)(5)(B)(ii), by failing to renew a TCEQ delivery certificate by timely and proper submission of a new UST registration and self-certification form to the TCEQ; PENALTY: $11,000; STAFF ATTORNEY: Justin Lannen, Litigation Division, MC R-4, (817) 588-5927; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Osama Azzam dba Super Stop 3; DOCKET NUMBER: 2005-1581-AIR-E; TCEQ ID NUMBER: RN102022241; LOCATION: 2725 North Mesa Street, El Paso, El Paso County, Texas; TYPE OF FACILITY: gasoline pumps with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by allowing the transfer of gasoline which may ultimately be used in a motor vehicle in the El Paso area with a Reid vapor pressure greater than 7.0 pounds per square inch, absolute from a motor vehicle fuel dispensing facility; PENALTY: $1,020; STAFF ATTORNEY: Robert Mosley, Litigation Division MC 175, (512) 239-0627; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(7) COMPANY: Robbie Mosley; DOCKET NUMBER: 2005-0848-PST-E; TCEQ ID NUMBERS: 15644 and RN101830685; LOCATION: Northwest corner of United States Highways 70 and 385, Springlake, Lamb County, Texas; TYPE OF FACILITY: out-of-service gasoline station; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.50(a)(1)(A) and TWC, §26.3475(a) and (c)(1), by failing to provide a method of release detection which was capable of detecting a release from any portion of the UST system which contained regulated substances; 30 TAC §334.7(d)(3) and TWC, §26.346, by failing to amend, update, or change UST registration information; 30 TAC §334.49(a) and TWC, §26.3475(d), by failing to protect the systems from corrosion so as to ensure that releases due to corrosion were prevented; 30 TAC §334.22(a) and TWC, §5.702, by failing to pay UST fees for Fiscal Year 2003 - 2005 and associated late fees; PENALTY: $7,200; STAFF ATTORNEY: Rebecca Davis, Litigation Division, MC 175, (512) 239-5487; REGIONAL OFFICE: Lubbock Regional Office, 4630 50th Street, Suite 600, Lubbock, Texas 79414- 3520, (806) 796-7092.

(8) COMPANY: Saira & Rizwan, Inc. dba Salt Grass Kountry 1; DOCKET NUMBER: 2005-1789- PWS-E; TCEQ ID NUMBER: RN104422159; LOCATION: 8150 Farm-to-Market Road 2917 near Alvin, Brazoria County, Texas; TYPE OF FACILITY: non-community public water supply; RULES VIOLATED: 30 TAC §290.109(c)(3)(A)(ii) and §290.122(c)(2)(B), by failing to collect and submit repeat bacteriological samples following coliform-positive sample results and to notify the public of theses noncompliances during the months of June 2003 and March 2004; 30 TAC §290.109(c)(2)(F) and §290.122(c)(2)(B), by failing to collect and submit the required number (five) of additional routine bacteriological samples following the month in which a positive coliform sample was obtained and to notify the public of these noncompliances during August 2003; 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to collect and submit monthly bacteriological samples and to notify the public of these noncompliances during the months of June and July 2004 and March and April 2005; 30 TAC §290.51(a)(3) and TWC, §5.702, by failing to pay outstanding water system late fees; PENALTY: $2,363; STAFF ATTORNEY: Mark Curnutt, Litigation Division, MC 175, (512) 239-0624; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(9) COMPANY: Sak Diamond Petroleum; DOCKET NUMBER: 2005-1657-PWS-E; TCEQ ID NUMBER: RN101446698; LOCATION: 9800 Interstate 20, Canton, Van Zandt County, Texas; TYPE OF FACILITY: non-community public water supply; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to collect and submit routine monthly bacteriological samples and failing to notify the public of the omissions during the months of June, July, and September 2004 and January - December 2005; PENALTY: $4,763; STAFF ATTORNEY: Robert Mosley, Litigation Division MC 175, (512) 239-0627; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(10) COMPANY: Sylvia Cervantes dba PDS General Store; DOCKET NUMBER: 2005-1645-PST- E; TCEQ ID NUMBER: RN101554731; LOCATION: 8732 South Highway 171, Grandview, Johnson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.22(a) and TWC, §5.702, by failing to pay late fees; PENALTY: $2,140; STAFF ATTORNEY: Deanna Sigman, Litigation Division, MC 175, (512) 239-0619; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: World Class Enterprises, Inc. dba MS-2 Express; DOCKET NUMBER: 2005- 1546-PST-E; TCEQ ID NUMBER: RN101843266; LOCATION: 2115 Avenue H, Rosenberg, Fort Bend County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.22(a) and TWC, §5.702, by failing to pay outstanding UST fees; PENALTY: $3,150; STAFF ATTORNEY: Robert Mosley, Litigation Division MC 175, (512) 239-0627; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200603608

Mary Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 5, 2006

♦ ♦ ♦

Notice of Opportunity to Comment on Order Vacating Dafault Order

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Order Vacating Default Order (Order) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the Order, the commission shall allow the public an opportunity to submit written comments on the proposed Order. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 14, 2006**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an order if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed order is not required to be published if those changes are made in response to written comments.

A copy of the proposed Order is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about the Order should be sent to the attorney designated for the Order at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 14, 2006**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the Order and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on the Order should be submitted to the commission in **writing**.

(1) COMPANY: Mary Fielder dba End of the Trail; DOCKET NUMBER: 2000-1254-PWS-E; TCEQ ID NUMBER: 0200425; LOCATION: 17325 Pearland Sites Road, Pearland, Brazoria County, Texas; TYPE OF FACILITY: public water system; AUTHORITY: 30 TAC §70.104(d); REQUESTED ACTION: Default Order issued against Mary Fielder dba End of the Trail and approved by the commission on May 12, 2004 will be vacated due to: 1) Mary Fielder was not responsible for operation of the facility when violations were documented during the months of March, May, August, November, and December 2000, June, July, and September 2001, January and March 2002, and June 2002 - June 2003; 2) Ms. Fielder did not receive notice of the enforcement proceedings against her; and 3) upon findings that notice was not received, the commission has the authority to grant such relief that it deems just; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023- 1486, (713) 767-3500.

TRD-200603605
Mary Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 5, 2006

♦ ♦ ♦

Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 14, 2006**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 14, 2006**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO should be submitted to the commission in **writing**.

(1) COMPANY: AJMM, Inc. dba E-Z Food Store; DOCKET NUMBER: 2005-1553-PST-E; TCEQ ID NUMBER: RN102892213; LOCATION: 14648 Walters Road, Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(c)(4) and Texas Water Code (TWC), §26.3475(d), by failing to inspect and test the cathodic protection system for operability and adequacy of protection within three to six months after installation and at a subsequent frequency of at least once every three years; 30 TAC §334.50(b)(2)(A)(i)(III) and TWC, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks (USTs); PENALTY: $7,350; STAFF ATTORNEY: Deanna Sigman, Litigation Division, MC 175, (512) 239-0619; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Albert Rivera; DOCKET NUMBER: 2005-1689-LII-E; TCEQ ID NUMBER: RN104745906; LOCATION: 10911 Candle River Lane, Spring, Harris County, Texas; TYPE OF FACILITY: irrigation system installer; RULES VIOLATED: 30 TAC §30.5(a) and §344.4(a), TWC, §37.003, and Texas Occupations Code, §903.251, by failing to hold an irrigators license prior to selling, designing, consulting, installing, maintaining, altering, repairing, or servicing an irrigation system, including the connecting of such system to any water supply; PENALTY: $625; STAFF ATTORNEY: Mark Curnutt, Litigation Division, MC 175, (512) 239-0624; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767- 3500.

(3) COMPANY: City of Graham; DOCKET NUMBER: 2005-1199-PWS-E; TCEQ ID NUMBER: RN101386308; LOCATION: 429 Fourth Street, Graham, Young County, Texas; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.113(f)(4) and Texas Health and Safety Code (THSC), §341.0315(c), by exceeding the maximum containment level (MCL) of 0.080 milligrams per liter for total trihalomethanes during the third quarter of 2004 based on the running annual average (RAA); PENALTY: $845; STAFF ATTORNEY: Rachael Gaines, Litigation Division, MC 175, (512) 239-0078; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(4) COMPANY: Ennis West End, Inc. dba Tiger Mart 23; DOCKET NUMBER: 2004-1499-PST-E; TCEQ ID NUMBERS: 73349 and RN101566081; LOCATION: 2200 West Lake Bardwell, Ennis, Ellis County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of three petroleum USTs for the one-year period preceding November 19, 2002; PENALTY: $2,400; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Goodspeed Sand Company, Inc.; DOCKET NUMBER: 2004-1142-WQ-E; TCEQ ID NUMBER: RN102770419; LOCATION: 7000 Farm-to-Market Road 917 East, Alvarado, Johnson County, Texas; TYPE OF FACILITY: surface mining operation; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(a)(ii), by failing to obtain authorization to discharge storm water associated with industrial activity to the waters in the state through an individual permit, the Multi-Sector General Permit (MSGP) TXR050000 issued under the Texas Pollutant Discharge Elimination System, or by qualifying for the Conditional No Exposure Certification for Exclusion under 40 CFR §122.26(g); PENALTY: $6,000; STAFF ATTORNEY: Justin Lannen, Litigation Division, MC R-4, (817) 588-5927; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Kamal Chowdhury dba Prime Stop 1; DOCKET NUMBER: 2005-0203-PST-E; TCEQ ID NUMBER: RN102049202; LOCATION: 4414 Wesley Street, Greenville, Hunt County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to ensure that all tanks are monitored for releases at a frequency of at least once every month, not to exceed 35 days between each monitoring; 30 TAC §334.8(c)(5)(A)(iii) and TWC, §26.3467(a), by failing to post a valid, current delivery certificate in a location at the facility where the document is clearly visible at all times; 30 TAC §334.8(c)(5)(C), by failing to permanently tag or label each UST fill tube at the facility with the number used to identify the tank on the registration and self-certification form filed with the commission; PENALTY: $7,000; STAFF ATTORNEY: Justin Lannen, Litigation Division, MC R-4, (817) 588- 5927; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: Kelly Williamson; DOCKET NUMBER: 2005-1381-PST-E; TCEQ ID NUMBER: RN104747514; LOCATION: Interstate Highway 40 and Wells Street, Brushland, Potter County, Texas; TYPE OF FACILITY: underground storage tank contractor; RULES VIO-

LATED: 30 TAC §30.18(a) and §334.55(a)(3) and TWC, §37.003, by removing a UST system from the ground at the facility without a UST on-site supervision license; PENALTY: $2,500; STAFF ATTORNEY: Rachael Gaines, Litigation Division, MC 175, (512) 239-0078; REGIONAL OFFICE: Amarillo Regional Office, 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(8) COMPANY: K.J. Plunkett Sand & Base, Inc.; DOCKET NUMBER: 2004-1808-MLM-E; TCEQ ID NUMBER: RN102922382; LOCATION: 13430 Park Avenue, Conroe, Montgomery County, Texas; TYPE OF FACILITY: unauthorized municipal solid waste disposal facility; RULES VIOLATED: 30 TAC §330.5(c), by disposing of municipal solid waste without authorization; 30 TAC §111.201 and THSC, §382.085(b), by failing to prevent unauthorized outdoor burning at the site on May 9, 2005; PENALTY: $6,540; STAFF ATTORNEY: Mark Curnutt, Litigation Division, MC 175, (512) 239-0624; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(9) COMPANY: Mine Service, Ltd.; DOCKET NUMBER: 2005-1361-AIR-E; TCEQ ID NUMBER: RN104483441; LOCATION: 3788 West Farm-to-Market Road 487, Jarrell, Williamson County, Texas; TYPE OF FACILITY: portable rock crusher; RULES VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(a), by failing to obtain a permit or meet the conditions of a permit by rule; PENALTY: $10,000; STAFF ATTORNEY: Shannon Strong, Litigation Division, MC 175, (512) 239-0972; REGIONAL OFFICE: Austin Regional Office, 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(10) COMPANY: Pat Hornsby dba Pat's Place; DOCKET NUMBER: 2005-1350-PWS-E; TCEQ ID NUMBER: RN102680196; LOCATION: 20174 South Highway 281, Lipan, Palo Pinto County, Texas; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B), and THSC, §341.033(d), by failing to collect bacteriological samples for the months of September 2004 - February 2005, and failing to provide public notice of the failure to collect bacteriological samples for the months of September - December 2004; PENALTY: $1,980; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Quail Valley Estates, Inc. dba Quail Valley Estates Mobile Homes; DOCKET NUMBER: 2005-1804-PWS-E; TCEQ ID NUMBER: RN102671062; LOCATION: 4525 Brookside Drive, Vidor, Hardin County, Texas; TYPE OF FACILITY: community public water supply system; RULES VIOLATED: 30 TAC §290.109(f)(3) and §290.122(b)(2)(A) and THSC, §341.031(a), by exceeding the MCL for coliform bacteria during January 2005, and by failing to post public notice of the noncompliance; 30 TAC §290.109(c)(2)(A)(ii) and §290.122(c)(2)(A) and THSC, §341.033(d), by failing to collect and submit routine bacteriological samples and by failing to post public notice of these noncompliances during the months of February 2003 and December 2004; 30 TAC §290.109(c)(2)(F) and §290.122(c)(2)(A), by failing to collect and submit five distribution samples following positive coliform sample results and by failing to post public notice of these noncompliances during January 2003 and February 2005; 30 TAC §290.109(c)(3)(A)(ii) and §290.122(c)(2)(A), by failing to collect and submit any repeat samples following a positive coliform sample test result during January 2005 and by failing to post public notice of the noncompliance; PENALTY: $1,650; STAFF ATTORNEY: Rachael Gaines, Litigation Division, MC 175, (512) 239-0078; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(12) COMPANY: Robert Pine dba Willow Manor Mobile Home Park; DOCKET NUMBER: 2005- 2003-PWS-E; TCEQ ID NUMBER: RN101239549; LOCATION: County Road 48, south of Mustang Bayou, Brazoria County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(ii) and THSC, §341.033(d), by failing to collect and submit monthly water samples for bacteriological analysis; PENALTY: $2,480; STAFF ATTORNEY: Deanna Sigman, Litigation Division, MC 175, (512) 239-0619; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: Sand & Gravel, Inc.; DOCKET NUMBER: 2005-1509-WQ-E; TCEQ ID NUMBER: RN102993300; LOCATION: 850 Farm-to-Market Road 1827, Graham, Young County, Texas; TYPE OF FACILITY: sand and gravel facility; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activity; PENALTY: $1,050; STAFF ATTORNEY: Robert Mosley, Litigation Division, MC 175, (512) 239-0627; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(14) COMPANY: Sona Stores, Inc. dba Sunshine Groceries; DOCKET NUMBER: 2005-1796- PST-E; TCEQ ID NUMBER: RN102789138; LOCATION: Highway 190 and Farm-to-Market 1416, Bon Weir, Newton County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking, which clearly and legibly shows the designated UST identification number identical to the UST identification number listed on the UST registration and self-certification form, was permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube for each regulated UST at the facility; 30 TAC §334.49(c)(2)(C) and (4), and TWC, §26.3475(d), by failing to properly test and inspect the rectifier and other system components of the cathodic protection system at least once every 60 days, and by failing to ensure that a qualified corrosion specialist or corrosion technician, in accordance with a code or standard of practice developed by a nationally recognized corrosion association or independent testing laboratory, inspected and tested the corrosion protection system for operability and adequacy of protection at least once every three years after installation; and 30 TAC §334.10(b), by failing to have required UST records maintained, readily accessible and available for inspection upon request by a representative of the TCEQ; PENALTY: $3,600; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898- 3838.

(15) COMPANY: Stephenville Mobile Home Park, Ltd. dba Shady Oaks Mobile Home Park, Maylar, L.P. dba Shady Oaks Mobile Home Park, and Arthur Hendricks dba Shady Oaks Mobile Home Park; DOCKET NUMBER: 2005-1982-AIR-E; TCEQ ID NUMBER: RN102683448; LOCATION: 154 Private Road 1329, Stephenville, Erath County, Texas; TYPE OF FACILITY: mobile home park; RULES VIOLATED: 30 TAC §101.4 and §111.201 and THSC, §382.085(a) and (b), by failing to comply with the general prohibition of outdoor burning at the site by burning debris and causing nuisance conditions; PENALTY: $4,600; STAFF ATTORNEY: Robert Mosley, Litigation Division MC 175, (512) 239-0627; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: Texas Lime Company; DOCKET NUMBER: 2003-0145-AIR-E; TCEQ ID NUMBER: RN100210889; LOCATION: 15865 Farm-to-Market Road 1434, Cleburne, Johnson County, Texas; TYPE OF FACILITY: lime manufacturing facility; RULES

VIOLATED: 30 TAC §101.221(a) and §116.115(b) and (c), and Air Permit No. 20519, General Conditions No. 8, and THSC, §382.085(b), by failing to maintain all pollution capture and abatement equipment in good working order and properly operate the equipment during normal facility operations; 30 TAC §111.155 and THSC, §382.085(b), by failing to meet the particulate matter specifications from a source or sources operated on the property or from multiple sources operated on contiguous properties which exceeded 200 micrograms per cubic meter of air sampled, averaged over any three consecutive hours and 400 micrograms per cubic meter of air sampled, averaged over any one-hour period, 30 TAC §101.4 and THSC, §382.085(b), by failing to prevent the discharge of air contaminants which interfered with the normal use and enjoyment of vegetation and property or adversely affected human health or welfare, animal life, vegetation, or property; 30 TAC §111.201 and THSC, §382.085(b), by failing to comply with the outdoor burning rules of Texas which state that no person may cause, suffer, allow, or permit any outdoor burning within the state except as provided by 30 TAC §111.201; 30 TAC §101.201(b) and THSC, §382.085(b), by failing to create a final record of all reportable and non-reportable emissions events as soon as practicable, but no later than two weeks after the end of an emissions event; 30 TAC §116.115(c) and §101.5; Permit No. 7501, Special Condition No. 3; Permit No. 5602A, Special Condition No. 5; Permit No. 20519, Special Condition No. 9C; and THSC, §382.085(b), by failing to control fugitive dust emission by spraying, with water and/or appropriate chemicals, the coal, the petroleum coke stockpiles, and the plant roads; 30 TAC §116.110(a), and THSC, §382.085(b), by failing to have all material handling and transfer points of the lime handling and storage system enclosed or vented to the baghouse; 30 TAC §116.115(c) and §111.111(a) and Air Permit No. 20519, Special Conditions Nos. 6, 7, and 8; and THSC, §382.085(b), by failing to maintain opacity within permitted limits, and by failing to comply with the opacity specifications of 30% from any building, enclosed facility, or other structure; PENALTY: $50,625; STAFF ATTORNEY: Kathleen Decker, Litigation Division, MC 175, (512) 239-6500; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(17) COMPANY: United States International Boundary and Water Commission; DOCKET NUMBER: 2005-1298-PWS-E; TCEQ ID NUMBER: RN101214732; LOCATION: 80 miles southeast of Laredo, 30 miles southeast of Zapata, and 150 miles above the mouth of the Rio Grande, Starr County, Texas; TYPE OF FACILITY: public water supply facility; RULES VIOLATED: 30 TAC §341.0315(c) and §290.113(f)(4), by exceeding the MCL based on a running annual average for total trihalomethanes during the fourth quarter of 2004; 30 TAC §341.0315(c) and §290.113(f)(5), by exceeding the MCL based on a running annual average for haloacetic acids during the fourth quarter of 2004; PENALTY: $665; STAFF ATTORNEY: Becky Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

TRD-200603607
Mary Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 5, 2006

♦ ♦ ♦

Notice of Opportunity to Comment on Shut Down Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Shutdown Orders (SOs). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill, and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes an SO after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill, and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 14, 2006**. The commission will consider any written comments received; and the commission may withdraw or withhold approval of an SO if a comment discloses facts or considerations that indicate that the consent to the proposed SO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed SO is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed SOs is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the SO should be sent to the attorney designated for the SO at the commission's central office at P. O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 14, 2006**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the SOs and/or the comment procedure at the listed phone numbers; however, comments on the SOs should be submitted to the commission in **writing**.

(1) COMPANY: Heart of Texas Investments, Inc. dba A & A Chevron; DOCKET NUMBER: 2005-1168-PST-E; TCEQ ID NUMBERS: 32073 and RN101672632; LOCATION: 1601 East Main Street, Gatesville, Coryell County, Texas; TYPE OF FACILITY: underground storage tanks (USTs); RULES VIOLATED: 30 TAC §334.49(a) and TWC, §26.3475(d), by failing to provide proper corrosion protection for a UST system; 30 TAC §334.7(a)(1), by failing to register a UST with the TCEQ; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-200603606
Mary Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 5, 2006

♦ ♦ ♦

Notice of Public Hearings on Proposed Revisions to 30 TAC Chapter 115 and to the State Implementation Plan

The Texas Commission on Environmental Quality will conduct public hearings to receive testimony concerning revisions to 30 TAC Chapter 115, Control of Air Pollution from Volatile Organic Compounds, under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102, of the United States Environmental

Protection Agency (EPA) regulations concerning state implementation plans (SIPs).

The proposed amendments to §§115.10, 115.119, 115.129, 115.139, 115.149, 115.219, 115.239, 115.319, 115.359, 115.419, 115.439, 115.449, 115.519, and 115.539 would subject certain volatile organic compound-emitting facilities located in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties to the same control, monitoring, testing, recordkeeping, and recording requirements to which facilities in the other four counties in the Dallas-Fort Worth nonattainment area are subject.

Two public hearings on this proposal will be held on August 8, 2006, at 2:30 p.m. and 6:30 p.m, Waxahachie City Hall Council Chambers, 401 S. Rogers, Waxahachie, Texas. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. A time limit may be established at each hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to informally discuss the proposal 30 minutes before each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Teresa Hurley of the Air Quality Planning and Implementation Division at (512) 239-5316.

Comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, e-mailed to *TRRules@tceq.state.tx.us*, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2006-011-115-EN. The comment period closes August 14, 2006. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Teresa Hurley of the Air Quality Planning and Implementation Division at (512) 239-5316.

TRD-200603556
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 30, 2006

♦ ♦ ♦

Notice of Request for Public Comment and Notice of a Public Meeting for a Total Maximum Daily Load (TMDL) and Update to the State Water Quality Management Plan

The Texas Commission on Environmental Quality (TCEQ or commission) has made available for public comment a draft Total Maximum Daily Load (TMDL) to address elevated levels of zinc in oyster tissue in Nueces Bay, in Nueces and San Patricio Counties. The TCEQ will conduct a public meeting to receive comments on the draft TMDL. This announcement also constitutes notice that the TMDL will become part of the State Water Quality Management Plan upon approval by the United States Environmental Protection Agency (EPA).

Nueces Bay (Segment 2482) has an area of 28.9 square miles and drains the Nueces River Basin, along with portions of the San Antonio-Nueces and Nueces-Rio Grande Coastal Basins. The headwaters of the Nueces River originate in the central Texas hill country and flow approximately 315 miles to Nueces Bay near Corpus Christi. Principal tributaries of the Nueces River include the Atascosa and Frio Rivers. The western part of the Edwards Aquifer lies within the basin, along with Choke Canyon Reservoir and Lake Corpus Christi. The western part of Corpus Christi is the only major metropolitan area within the boundary of the watershed. Other large communities within the basin include Uvalde, Pleasanton, George West, and Three Rivers.

Texas is required to develop TMDLs for impaired water bodies under the Federal Clean Water Act §303(d). A TMDL is a detailed water quality assessment that provides the scientific foundation to allocate pollutant loads in a certain body of water in order to restore and maintain designated uses.

The TCEQ will conduct a public meeting on the draft TMDL for zinc in oyster tissue. The purpose of the public meeting is to provide the public an opportunity to comment on the draft TMDL. The commission requests comment on each of the six major components of the TMDL: problem definition, endpoint identification, source analysis, linkage between sources and receiving waters, margin of safety, and pollutant loading allocation. After the public comment period, TCEQ staff may revise the TMDL, if appropriate. The final TMDL will then be considered by the commission for adoption. Upon adoption of the TMDL by the commission, the final TMDL and a response to all comments will be made available on the TCEQ Web site, located at *http://www.tceq.state.tx.us/water/quality/tmdl*. The TMDL will then be submitted to EPA Region 6 for approval as an update to the State of Texas Water Quality Management Plan.

A public meeting will be held on Thursday, July 27, 2006, at 7:00 p.m. at the Harte Research Institute Building, Room 127, on the Texas A&M University Corpus Christi campus located at 6300 Ocean Drive (west end of the campus). Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the meeting; however, a commission staff member will be available to discuss the matter 30 minutes prior to the meeting and will answer questions before and after the meeting. Only comments for the TMDL will be taken, no other TMDL projects will be discussed at the meeting. Written comments should be submitted to Andrew Sullivan, TCEQ Water Division, MC 203, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1414. All comments must be received by 5:00 p.m., August 14, 2006, and should reference, *One Total Maximum Daily Load for Zinc in Oyster Tissue in Nueces Bay*. For further information regarding the draft TMDL, please contact Andrew Sullivan, Water Division, (512) 239-4587 or *asulliva@tceq.state.tx.us*. Copies of the draft TMDL document can be obtained via the commission's Web site at *http://www.tceq.state.tx.us/implementation/water/tmdl/index.html* or by calling Andrew Sullivan at (512) 239-6643.

Persons who have special communication or other accommodation needs who are planning to attend the meeting should contact the commission at (512) 239-4900. Requests should be made as far in advance as possible.

TRD-200603593
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: July 5, 2006

♦ ♦ ♦

Notice of Water Quality Applications

The following notices were issued during the period June 9, 2006.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

CITY OF ALBA has applied for a renewal of TPDES Permit No. 14451-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 80,000 gallons per day. The facility is located west of Farm-to-Market Road 17, one mile southwest of the intersection of State Highway 69 and Farm-to-Market Road 17, south of the City of Alba in Wood County, Texas.

AZLE INDEPENDENT SCHOOL DISTRICT has applied for a renewal of Permit No. 13304-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 9,000 gallons per day via surface irrigation of 4.42 acres of non-public access land. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately 3.5 miles southwest of the Town of Azle and adjacent to and east of Farm-to-Market Road 730 in Parker County, Texas.

CITY OF BRYAN has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010426004, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 4,000,000 gallons per day. The facility is located approximately 8,500 feet south-southeast of the intersection of Texas Highway 47 at Leonard Road (Farm-to-Market Road 1688) and adjacent to Thompsons Creek near its confluence with the Brazos River in Brazos County, Texas.

CITY OF CENTER has applied for a renewal of TPDES Permit No. 14352-001, which authorizes the discharge of filter backwash effluent from a water treatment plant at a daily average flow not to exceed 200,000 gallons per day. The facility is located south of Pinkston Reservoir and west of State Highway 7, approximately three miles east-northeast of the intersection of State Highway 7 and Farm-to-Market Road 2913 in Shelby County, Texas.

CITY OF FRANKSTON has applied for a renewal of TPDES Permit No. 10441-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located south of the City of Frankston, immediately north of Caddo Creek, and approximately 1000 feet south and 1500 feet east of the intersection of State Highway 175 in Anderson County, Texas.

CITY OF HUNTINGTON has applied for a major amendment to TPDES Permit No. WQ0010191001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 350,000 gallons per day to a daily average flow not to exceed 420,000 gallons per day. The facility is located approximately 1 mile southeast of the intersection of U.S. Highway 69 and Farm-to-Market Road 1669 between the Southern Pacific Railroad and Shawnee Creek in Angelina County, Texas.

JARVIS CHRISTIAN COLLEGE has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. 11609-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located approximately 300 feet south of U.S. Highway 80 and one and three-fourths miles east of the intersection of U.S. Highway 80 and Farm-to-Market Road 14 in the City of Hawkins in Wood County, Texas

POOLVILLE INDEPENDENT SCHOOL DISTRICT has applied for a renewal of Permit No. 14374-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 8,000 gallons per day via evaporation. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately one mile west of the intersection of Farm-to-Market Road 920 and County Road 3107 in Parker County, Texas.

U.S. DEPARTMENT OF AGRICULTURE, C/O U.S. FOREST SERVICE, has applied for a renewal of Permit No. 12211-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 9,000 gallons per day via surface irrigation of 2.5 acres of public access grassland. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located just below the dam of the Red Hills Lake which is 0.75 mile east of State Highway 87 on Forest Road 116 and three miles northeast of the City of Milam in Sabine County, Texas.

CITIES OF WACO, WOODWAY, BELLMEAD, LACY-LAKEVIEW, ROBINSON and HEWITT have applied for a renewal of TPDES Permit No. 11071-001which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 37,800,000 gallons per day. Additionally, the applicants request that the existing sludge lagoons be reclassified as surface disposal units; that language be added to the permit which recognizes that the applicants are authorized to reuse treated effluent in accordance with §210 of Title 30 of the Texas Administrative Code (TAC). The pretreatment requirements have been revised in the draft permit in order for the applicant to develop a new pretreatment program. This application was submitted on November 26, 2003, the applicants requested a major amendment to include two interim phases with a compliance schedule. On January 27, 2006, the applicants requested that the application be processed as a renewal instead of a major amendment. The Executive Director recommends granting the applicants January 27th request. The facility is located on the southwest bank of the Brazos River, approximately 4.5 miles downstream from the crossing of Interstate Highway 35 and the Brazos River in McLennan County, Texas. The sludge disposal site is located adjacent to the wastewater treatment facility.

TRD-200603592
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 5, 2006

♦ ♦ ♦

Texas Health and Human Services Commission

Notification of Consulting Procurement

Pursuant to Chapter 2254, Subchapter B, Texas Government Code, the Health and Human Services Commission (HHSC) announces the release of its Request for Proposals for consultant services to assist the State in assuring the effective performance of the Medicaid Claims/Primary Care Case Management (PCCM) Administrator vendor via Independent Verification and Validation Services (RFP #529-06-0376). HHSC seeks to contract with a single qualified vendor to fulfill the requirements pursuant to this RFP.

The primary objectives for this procurement are to assist HHSC in administering the Medicaid Claims/PCCM Administrator by:

Assuring the accurate, complete and timely delivery of technology services; Monitoring and reporting on the Medicaid Claims/PCCM Administrator vendor performance, specifically related to quality, risk management and issues resolution on specified technology projects; and Exploring opportunities to maximize efficiency and reduce costs in the administration of the affected State programs.

The RFP is located in full on HHSC's Business Opportunities Page under "Contracting Opportunities" link at http://www.hhsc.state.tx.us/about_hhsc/BusOpp/BO_opportunities.html. HHSC also posted notice of the procurement on the Texas Marketplace on June 30, 2006.

The successful Vendor will demonstrate the ability to meet these objectives and will be evaluated, in part, by the degree to which the respondent shows how it will achieve them.

The Health and Human Services Commission's Sole Point-Of-Contact for this procurement is:

Peggie J. Laser

Procurement Project Manager

Texas Health and Human Services Commission

P.O. Box 85200-5200

Austin, Texas 78708-5200

(512) 491-1195

Peggie.laser@hhsc.state.tx.us

All questions regarding the RFP must be sent in writing to the above-referenced contact by 5:00 PM Central Time on July 13, 2006. HHSC will post all written questions received with HHSC's responses on its website on July 20, 2006, or as they become available. All proposals must be received at the above-referenced address on or before 3:00 PM Central Time on August 11, 2006. Proposals received after this time and date will not be considered.

All proposals will be subject to evaluation based on the criteria and procedures set forth in the RFP. HHSC reserves the right to accept or reject any or all proposals submitted. HHSC is under no legal or other obligation to execute any contracts on the basis of this notice. HHSC will not pay for costs incurred by any entity in responding to this RFP.

TRD-200603579
Martin Zelinsky
Assistant General Counsel
Texas Health and Human Services Commission
Filed: July 3, 2006

♦ ♦ ♦

Department of State Health Services

Notice of Public Hearing for Newborn Screening Rules

The Department of State Health Services, Newborn Screening Branch, will hold a public hearing to take public comments on proposed rules concerning the expansion of the newborn screening panel. The proposed rules, located in 25 Texas Administrative Code, §§37.51 - 37.67 (repeals) and §§37.51 - 37.65 (new rules) were published in the July 7, 2006, issue of the *Texas Register*.

The public hearing will be held at 9:00 a.m. on Friday, August 4, 2006, in the Main Building, Room K-100 (Auditorium), Department of State Health Services, 1100 West 49th Street, Austin, Texas, 78756.

Further information may be obtained from David R. Martinez, Manager of the Newborn Screening Branch, Department of State Health Services, 1100 West 49th Street, Austin, Texas, 78756, telephone (512) 458-7111, extension 2216.

TRD-200603591
Cathy Campbell
General Counsel
Department of State Health Services
Filed: July 3, 2006

♦ ♦ ♦

Texas Department of Insurance

Company Licensing

Application to change the name of FARMERS MUTUAL PROTECTIVE ASSOCIATION OF TEXAS to R.V.O.S. FARM MUTUAL INSURANCE, a domestic fire and/or casualty company. The home office is in Temple, Texas.

Application to the State of Texas by CHRISTIAN CARE CENTERS, INC., to do business as (dba) BRIDGEVIEW ESTATES, a continuing care retirement community. The home office is in Mesquite, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the Texas Register publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200603610
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: July 5, 2006

♦ ♦ ♦

Texas Lottery Commission

Instant Game Number 689 "Triple Blackjack"

1.0 Name and Style of Game.

A. The name of Instant Game No. 689 is "TRIPLE BLACKJACK". The play style is "poker".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 689 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 689.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: $3.00, $5.00, $10.00, $20.00, $50.00, $70.00, $100, $500, $1,000, $3,000, $33,000, 2 CARD SYMBOL, 3 CARD SYMBOL, 4 CARD SYMBOL, 5 CARD SYMBOL, 6 CARD SYMBOL, 7 CARD SYMBOL, 8 CARD SYMBOL, 9 CARD SYMBOL, 10 CARD SYMBOL, JACK CARD SYMBOL, QUEEN CARD SYMBOL, KING CARD SYMBOL, ACE CARD SYMBOL, 14, 15, 16, 17, 18, 19, 20 or BUST SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 689 - 1.2D

PLAY SYMBOL	CAPTION
$3.00	THREE$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$70.00	SEVENTY
$100	ONE HUN
$500	FIV HUN
$1,000	ONE THOU
$3,000	THREE THOU
$33,000	33 THOU
2 CARD SYMBOL	TWO
3 CARD SYMBOL	THR
4 CARD SYMBOL	FOR
5 CARD SYMBOL	FIV
6 CARD SYMBOL	SIX
7 CARD SYMBOL	SVN
8 CARD SYMBOL	EGT
9 CARD SYMBOL	NIN
10 CARD SYMBOL	TEN
JACK CARD SYMBOL	JCK
QUEEN CARD SYMBOL	QUN
KING CARD SYMBOL	KNG
ACE CARD SYMBOL	ACE
14	FRN
15	FTN
16	SXN
17	STN
18	ETN
19	NTN
20	TWY
BUST SYMBOL	BUST

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 689 - 1.2E

CODE	PRIZE
THR	$3.00
FIV	$5.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $3.00, $5.00, $10.00 or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $70.00, $100 or $500.

I. High-Tier Prize - A prize of $1,000, $3,000 or $33,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (689), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 689-0000001-001.

L. Pack - A pack of "TRIPLE BLACKJACK" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket 001 will be shown on the front of the pack; the back of ticket 125 will be revealed on the back of the pack. All packs will be tightly shrink-wrapped. There will be no breaks between the tickets in a pack. Every other book will reverse i.e., reverse order will be: the back of ticket 001 will be shown on the front of the pack and the front of ticket 125 will be shown on the back of the pack.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "TRIPLE BLACKJACK" Instant Game No. 689 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "TRIPLE BLACKJACK" Instant Game is determined once the latex on the ticket is scratched off to expose 39 (thirty-nine) Play Symbols. For each table, the player adds the two cards in each PLAYER'S hand. If the total in any PLAYER'S hand is higher than the DEALER'S HAND for that TABLE, the player wins the prize shown for that PLAYER'S hand. If a player reveals a "BUST" symbol under DEALER'S HAND, the player wins all four prizes for that table. J=10, Q=10, K=10, A=11. Players can win up to 12 times on this ticket. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 39 (thirty-nine) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 39 (thirty-nine) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 39 (thirty-nine) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 39 (thirty-nine) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets within a pack will not have identical patterns.

B. Players can win up to twelve (12) times in this game.

C. The play area consists of three (3) TABLES. Each TABLE consists of one (1) DEALER'S HAND, four (4) PLAYER'S hands and four (4) prize symbols.

D. Jack, Queen, and King will have a point value of ten (10). Ace will have a point value of eleven (11).

E. In each table, there will be no ties between the DEALER'S HAND and any of the PLAYER'S hands.

F. A score of twenty-one (21) will never appear in the DEALER'S HAND.

G. A range of scores from fourteen (14) to twenty (20) and BUST will be used for the DEALER'S HAND.

H. A range of scores from twelve (12) to twenty-one (21) will be used for the PLAYER'S hands.

I. All PLAYER'S hands will consist of two (2) cards.

J. No PLAYER'S hand will consist of two (2) Aces.

K. On each TABLE, there will be no more than four (4) of the same card symbol, simulating a deck of cards.

L. On each TABLE, no more than two (2) PLAYER'S hands may contain identical totals.

M. No TABLE will have two (2) or more PLAYER'S hands with identical card symbols.

N. On each TABLE, there will be no more than two (2) identical prize amounts except when required by multiple wins.

O. Doubles (2 of the same card symbol in the same hand) on a single PLAYER'S hand are allowable, with respect to other restrictions.

P. On each TABLE, there should be no more than one (1) set of doubles.

Q. If the DEALER'S HAND busts, the DEALER'S HAND on the uncovered ticket front will be replaced by the DEALER'S HAND play symbol "BUST".

R. Non-winning tickets will never contain the value twenty-one (21) in the entire play area.

S. Non-winning tickets will never contain the word BUST over the entire play area.

2.3 Procedure for Claiming Prizes.

A. To claim a "TRIPLE BLACKJACK" Instant Game prize of $3.00, $5.00, $10.00, $20.00, $50.00, $70.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $70.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "TRIPLE BLACKJACK" Instant Game prize of $1,000, $3,000 or $33,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TRIPLE BLACKJACK" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "TRIPLE BLACKJACK" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "TRIPLE BLACKJACK" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 4,080,000 tickets in the Instant Game No. 689. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 689 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	505,920	8.06
$5	293,760	13.89
$10	106,080	38.46
$20	48,960	83.33
$50	20,400	200.00
$70	13,702	297.77
$100	6,800	600.00
$500	200	20,400.00
$1,000	60	68,000.00
$3,000	11	370,909.09
$33,000	6	680,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.10. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 689 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 689, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200603530
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 30, 2006

♦ ♦ ♦

Texas Parks and Wildlife Department

Notice of Early Gulf Shrimp Season Opening

The Executive Director of the Texas Parks and Wildlife Department hereby orders that the Gulf shrimp season open on July 10, 2006. Based on sound biological data, the executive director has determined that optimum migration of small brown shrimp from the bays to the Gulf of Mexico will occur earlier than the July 15 opening date established by rule. Sound biological data indicate that by July 10, 2006, most of the shrimp on the Gulf fishing grounds will be of satisfactory size to achieve maximum benefits from the resource.

The purpose of the closed Gulf season is to protect brown shrimp during their major period of emigration from the bays to the Gulf of Mexico until they reach a larger, more valuable size before harvest. The season closed 30 minutes after sunset, May 15, 2006.

The executive director finds that, based on biological evidence, it is necessary to open the season earlier than scheduled in order to obtain optimum yield from the resource.

This action is pursuant to the authority of Parks and Wildlife Code, §77.062, which authorizes the commission to change the opening and closing dates of the June 1 to July 15 closed season to provide for an earlier, later, or longer season not to exceed 60 days, to change the closing date with 72 hours public notice, to reopen the season with 24 hours notice, and to delegate to the director the duties and responsibilities of opening and closing the shrimping season.

TRD-200603578
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: June 30, 2006

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on June 28, 2006, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001-66.016 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Project Title and Number: Application of Etan Industries, Incorporated, doing business as CMA Communications, for a State-Issued Certificate of Franchise Authority, Project Number 32872 before the Public Utility Commission of Texas.

Applicant intends to provide cable service. The requested CFA service area footprint includes the city limits of Sealy, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 32872.

TRD-200603563
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 30, 2006

♦ ♦ ♦

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On June 29, 2006, Global Internetworking, Incorporated filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60710. Applicant intends to reflect a change in ownership/control whereby Mercator Partners Acquisition Corporation will acquire 100% of the issued and outstanding capital stock of Global Internetworking, Incorporated.

The Application: Application of Global Internetworking, Incorporated for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 32873.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 19, 2006. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 32873.

TRD-200603562
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 30, 2006

♦ ♦ ♦

Notice of Application for Certificate of Convenience and Necessity for a Proposed Transmission Line in Hidalgo County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on June 27, 2006, for a certificate of convenience and necessity for a proposed transmission line in Hidalgo County, Texas.

Docket Style and Number: Application of Magic Valley Electric Cooperative, Inc. (MVEC) for a Certificate of Convenience and Necessity for a Proposed Transmission Line in Hidalgo County. Docket Number 32775.

The Application: The project is designated the Doedyns to Gandy 138 kV Transmission Line Project. The proposed project is necessary to address the electric service requirements of one of the most rapidly growing areas in the MVEC electric system located in the territory north of the original portions of the towns of San Juan, Donna and Alamo, Texas The miles of right-of-way for the preferred route will be approximately 9.83 miles. The estimated date to energize facilities is September 1, 2007.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The current deadline for intervention in this proceeding is August 11, 2006. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 32775.

TRD-200603524
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 29, 2006

♦ ♦ ♦

Notice of Application for Relinquishment of a Service Provider Certificate of Operating Authority

On June 27, 2006, Centel Communications filed an application with the Public Utility Commission of Texas (commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60688. Applicant intends to relinquish its certificate.

The Application: Application of Centel Communications to Relinquish Service Provider Certificate of Operating Authority, Docket Number 32708.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 19, 2006. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 32708.

TRD-200603523
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 29, 2006

♦ ♦ ♦

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on June 26, 2006, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151-54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of TerraCom, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 32864 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, long distance, and wireless services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 19, 2006. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 32864.

TRD-200603525
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 29, 2006

♦ ♦ ♦

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on June 29, 2006, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151-54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of East Texas Rural Net, Incorporated for a Service Provider Certificate of Operating Authority, Docket Number 32786 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, long distance, wireless, and local loop 100 Base T, T3 or fractional T3 services.

Applicant's requested SPCOA geographic area includes the area currently served by AT&T Texas and Verizon Southwest.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 19, 2006. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 32786.

TRD-200603564
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 30, 2006

♦ ♦ ♦

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on June 29, 2006, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151-54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Cost Plus Communications, LLC for a Service Provider Certificate of Operating Authority, Docket Number 32877 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, T1-Private Line, Fractional T1, and long distance services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 19, 2006. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 32877.

TRD-200603565
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 30, 2006

♦ ♦ ♦

Notice of Petition for Emergency Rulemaking

On June 29, 2006, the Public Utility Commission of Texas (commission) received a petition for emergency adoption of a commission rule and request for expedited open meeting consideration.

Project Title and Number: Petition of the Office of the Public Utility Counsel of Texas to Adopt an Emergency Rule to Suspend Disconnection of Electric Utility Services Due to Extreme and Persistent Heat Conditions and Records High Electricity Prices; Project Number 32874.

Summary of Petition: On June 29, 2006, the Office of the Public Utility Counsel for Texas; AARP Texas; Texas Ratepayers Organization to Save Energy; Texas Legal Services Center; Gulf Coast Community Services Association; Gray Panthers of Austin; and Barnabas Connection of the Wimberley United Methodist Church filed a petition pursuant to P.U.C. Procedural Rule §22.283 for adoption of an emergency rule to suspend the disconnection by retail electric providers or electric utilities of retail electric service "for non-payment due to increased electricity usage from the occurrence of extreme and persistent warm weather in this state and the presence of record high electric rates." The proposed period in which disconnections would be suspended would run until September 30, 2006, contingent upon certain conditions.

The commission will consider and possibly act on this petition at its next open meeting, currently scheduled for July 20, 2006.

Comments on the petition may be submitted to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. Sixteen copies of comments to the proposed emergency rule are required to be filed pursuant to P.U.C. Procedural Rule §22.71(c). All comments should refer to Project Number 32874.

To obtain further information interested persons may call the commission toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free at 1-800-735-2989.

TRD-200603595
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 5, 2006

♦ ♦ ♦

Texas Department of Transportation

Public Notice Disadvantaged Business Enterprise Goals Fiscal Year 2007

In accordance with Title 49, Code of Federal Regulations, Part 26, recipients of federal-aid funds authorized by the Transportation Equity Act for the 21st Century (TEA 21) are required to establish Disadvantaged Business Enterprise (DBE) programs. Section 26.45 requires the recipients of federal funds, including the Texas Department of Transportation (department), to set overall goals for DBE participation in U. S. Department of Transportation assisted contracts. As part of this goal-setting process, the department is publishing this notice to inform the public of the proposed overall goals, and to provide instructions on how to obtain copies of documents explaining the rationale for each goal.

The proposed Fiscal Year 2007 DBE goals are 12.12% for highway design and construction, 13.86% for aviation design and construction, and 4.06% for public transportation. The proposed goals and goal-setting methodology for each is available for inspection between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday, until August 13, 2006. The information may be viewed in the office of the Texas Department of Transportation, Business Opportunity Programs Office, 200 E. Riverside Drive, Austin, Texas 78704, Rm 2B.20.

The department will accept comments on the DBE goals until August 28, 2006. Comments can be sent to Efrem Casarez, Business Opportunity Programs Office, 125 E. 11th St., Austin, Texas 78701; (512) 486-5502; Fax: (512) 486-5509; Email: ecasarez@dot.state.tx.us.

TRD-200603614
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: July 5, 2006

♦ ♦ ♦

University of North Texas

Notice of Intent to Extend and Amend Consulting Contract

The University of North Texas System ("UNT System") intends to extend and amend a contract for consulting services related to federal government relations. The consulting services have been provided by Congressional Solutions, Inc. under a contract with an initial term beginning May 17, 2005, and ending August 31, 2006. The contract provides that UNT System may, in its sole option, extend the term of the contract for up to two additional periods of twelve months each. UNT System intends to extend the term of the contract through August 31, 2008.

In addition to the extension, at this time it is necessary for UNT System to amend its contract with Congressional Solutions, Inc. Additional compensation in the amount of $45,000.00 is necessary to compensate consultant for work during the next 12 month period related to preparation of supporting documentation that was not anticipated when the original contract was executed.

As required by Chapter 2254 of the Texas Government Code, prior to extending and amending its contract with Congressional Solutions, Inc., UNT System is posting this Notice of Intent to Extend and Amend Consulting Contract, and hereby extends this invitation to qualified and experienced consultants interested in providing the consulting services described in this notice.

Scope of Work:

The federal government relations consulting firm will assist UNT System and its member institutions in: developing and executing a government relations strategy to attract support for research facilities, equipment, technology, and programs through federal initiatives pertaining, but not limited to, the United States Congress, federal agencies, and related entities; evaluating research resources, developing concepts and themes for agreed upon research initiatives, formulating strategies and timetables for presentation of research and related initiatives, preparing supporting documentation, coordinating meetings with elected representatives and legislative staff, serving as a liaison to all federal entities, and preparing testimony for presentation; developing legislative strategies; and monitoring and reporting on government programs relevant to research initiatives and other areas of interest to UNT System and its member institutions.

How to Respond; Submittal Deadline:

To respond to this invitation, consultants must submit the information requested in the Specifications section of this invitation and any other relevant information in a clear and concise written format to: Don Lynch, Purchasing Services Manager, University of North Texas System, P.O. Box 310499, Denton, TX 76203 (2310 North Interstate 35-E, Denton, TX 76201). Offers must be submitted in an envelope or other appropriate container and the name and return address of the consultant must be clearly visible. All offers must be received at the above address no later than 2:00 p.m., CST, August 15, 2006. Submissions received after the submittal deadline will not be considered.

Specifications:

Any consultant submitting an offer in response to this invitation must provide the following: (1) the consultant's legal name, type of entity (individual, partnership, corporation, etc.), and address; (2) background information regarding the consultant, including the number of years in business and the number of employees; (3) information regarding the qualifications, education, and experience of the team members proposed to conduct the requested services; (4) the monthly fee to be charged for providing the services and any applicable hourly rate for any team member providing services; (5) the earliest date by which the consultant could begin providing the services; (6) a list of five client references, including any complex institutions or systems of higher education for which the consultant has provided similar consulting services; (7) a statement of the consultant's approach to providing the services described in the Scope of Work section of this invitation, any unique benefits the consultant offers UNT System, and any other information the consultant desires UNT System to consider in connection with the consultant's offer; (8) information to assist UNT System in assessing the consultant's demonstrated competence and experience providing consulting services similar to the services requested in this invitation; (9) information to assist UNT System in assessing the consultant's experience performing the requested services for other complex institutions or systems of higher education; (10) information to assist UNT System in assessing whether the consultant will have any conflicts of interest in performing the requested services; (11) information to assist UNT System in assessing the overall cost to UNT System; and (12) information to assist UNT System in assessing the consultant's capability and financial resources to perform the requested services.

Selection Process:

The consulting services sought herein relate to services previously provided to UNT System by Congressional Solutions, Inc. UNT System intends to extend and amend its contract with Congressional Solutions, Inc. unless a better offer, as determined by UNT System in its sole discretion, is received in response to this invitation.

The successful offer must be submitted in response to this invitation no later than the submittal deadline and will be the offer that is the most advantageous to UNT System in UNT System's sole discretion. Offers will be evaluated by UNT System and member institution personnel. The evaluation of offers and the selection of the successful offer will

be based on information provided to UNT System by the consultant in response to the Specifications section of this invitation. Consideration may also be given to any additional information and comments if such information or comments increase the benefits to UNT System. The successful consultant will be required to enter into a contract acceptable to UNT System.

Finding by Chancellor:

The Chancellor of UNT System finds that the consulting services are necessary because UNT System does not have the specialized experience or the staff resources available in Washington, D.C. to support existing and proposed programs of UNT System and its member institutions. UNT System believes that such expert consulting services will be cost effective by expanding federal investment in research, teaching, and related programs in Texas throughout UNT System's member institutions.

Questions:

Questions concerning this invitation should be directed to: Don Lynch, Purchasing Services Manager, University of North Texas System, P.O. Box 310499, Denton, TX 76203 (2310 North Interstate 35-E, Denton, TX 76201). UNT System may in its sole discretion respond in writing to questions concerning this invitation. Only UNT System's responses made by formal written addenda to this invitation shall be binding. Oral or other written interpretations or clarifications shall be without legal effect.

TRD-200603573
Sandy Shelton
Director of Purchasing and Payment Services/HUB Coordinator
University of North Texas
Filed: June 30, 2006

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).